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362

P.F. BAUMAN,

(Plaintiff) Appellee,

v.

G.I.T. CORPORATION, a corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

278 I.A. 619¹

Opinion filed Dec. 19, 1934

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The defendant appeals from an order entered in the Municipal Court of Chicago, overruling the motion of the defendant to vacate and set aside a judgment against the defendant and in favor of the plaintiff for \$1,000.

The plaintiff's statement is in trover, and alleges that on April 19, 1932, plaintiff was lawfully possessed of his own property of one Nash Sedan, and one automobile robe, being of the value of \$1,000, and lost said goods and chattels, and the same came into the possession of the defendant, who refused to return the goods to the plaintiff. The defendant filed its affidavit of merits, which in general is a denial of the allegations contained in the plaintiff's statement of claim.

On June 30, 1932, this case was on the trial call of Judge Lyle, a judge of the Municipal Court of the City of Chicago, and when reached on that day the defendant not being present, evidence was heard and the court found the defendant guilty in the manner and form charged in plaintiff's statement of claim, and assessed plaintiff's damages at \$1,000, and entered judgment for the amount.

On July 1, 1932, a motion was made by the defendant to vacate said judgment, and in support of its motion defendant's counsel read into the record an affidavit of John R. Ryan, to the effect that he was the attorney for the defendant in the case of Bauman v. G. I. T. Corporation, and that on the night of June 29, 1932, and

2781.A.619

Opinion filed Dec. 19, 1934

The defendant entered in the Municipal Court of Chicago, overruling the motion of the defendant to set aside the verdict against the defendant and in favor of the plaintiff for \$1,000.

The plaintiff's statement is in trover, and alleges that on April 13, 1933, plaintiff was lawfully possessed of his own property of one black bed, and one automobile robe, being of the value of \$1,000, and lost said goods and chattels, and the same were in the possession of the defendant, who refused to return the goods to the plaintiff. The defendant filed its affidavit of denial, which in general is a denial of the allegations contained in the plaintiff's statement of claim.

On June 30, 1933, this case was on the trial call of Judge Wise, a Judge of the Municipal Court of the City of Chicago, and then reached on that day the defendant not being present, evidence was heard and the court found the defendant guilty in the manner and form charged in plaintiff's statement of claim, and assessed plaintiff's damages at \$1,000, and entered judgment for the amount.

On July 1, 1933, a motion was made by the defendant to set aside judgment, and in support of its motion defendant's counsel read into the record an affidavit of John E. Ryan, to the effect that he was the attorney for the defendant in the case of Hansen v. C.I. Corporation, and that on the night of June 28, 1933, and

early in the morning of June 30, 1932, he became severely ill and suffered acute pains in his abdomen; that he did not leave his home until about 9:30 o'clock on the morning of June 30th; that he telephoned his office to have one of his associates in the office appear and handle the case then pending before Judge Lyle in the Municipal Court, but none of the attorneys were present in his office at the time he telephoned; that affiant thereupon left his home and went directly to the court room of the Municipal Court, where the case was on the call, and arrived in Judge Lyle's court room about 10:30 a.m., and then learned that an ex parte judgment had been entered against the defendant. The affiant further states that he was ready for trial; that witnesses were notified to be ready to appear in court upon telephonic communication. It further appears from the affidavit that the defendant was the assignee of a certain conditional sales contract executed by the plaintiff, and that at the time of the alleged conversion, the defendant was the owner and had title to and in the lawful possession of the automobile and robe.

The motion of the defendant to vacate the judgment was denied, and this corporation perfected the appeal.

Upon the hearing of defendant's motion, the court commented upon the efforts made to influence the action of the court upon this motion, and as a result of the court's statements, the defendant complains that the trial court disregarded the facts and the law applicable thereto, and that the trial judge was prejudiced against the attorneys for the defendant, and had a personal aversion to finance companies.

We appreciate from the vigorous statements made, the state of mind of the court upon the efforts to influence his action upon the motion now pending. However, the trial court should not be influenced by such methods, but should fairly pass upon the motion.

with in the morning of June 3, 1932, he became severely ill and
afflicted with pneumonia; that he did not leave his home
until about 8:00 o'clock on the morning of June 24th; that he
telephoned his office to have one of the assistants in the office
appear and handle the case then being heard, and that, upon the
criminal court, but none of the attorneys were present in the office
at the time he telephoned; that without further delay he came and
went directly to the court room of the criminal court, where the
case was on the call, and arrived in Judge Hyde's court room about
10:10 a.m., and then learned that an ex parte judgment had been
entered against the defendant. The affiant further states that he
was ready for trial; that witnesses were notified to be ready to
appear in court upon telephonic communication. It further appears
from the affidavit that the defendant was the assignee of a certain
conditional sales contract executed by the plaintiff, and that at
the time of the alleged conversion, the defendant was the owner and
had title to and in the lawful possession of the automobile and tools.
The motion of the defendant to vacate the judgment was
denied, and this conversion constituted the cause.
Upon the hearing of defendant's motion, the court
commented upon the efforts made to influence the action of the court
upon this motion, and as a result of the court's statements, the
defendant complains that the trial court disregarded the facts and
the law applicable thereto, and that the trial judge was prejudiced
against the attorneys for the defendant, and had a personal aversion
to finance companies.
He complains from the various statements made, the
state of mind of the court upon the efforts to influence the action
upon the motion for judgment. However, the trial court should not be
influenced by such matters, but should act fairly upon the motion.

We have considered the affidavit in the record, and from the facts stated, are of the opinion that the defendant acted promptly in presenting its motion to vacate the ex parte judgment entered the previous day. It also appears from the affidavit that the attorney representing this defendant would have been present on the morning of the trial, but owing to illness was prevented from appearing at the time the case was reached on the call.

We are satisfied that the defendant was prepared to offer its defense, and no doubt would have presented its defense by witnesses but for the illness of its attorney.

The issue in this case is as to the ownership of the automobile in question.

The defense is that the defendant had title to the chattels in question and was in possession of the same, and this was an issue of fact to be determined from the evidence upon the trial of the case.

For the reasons stated, the motion of the defendant to vacate the judgment entered on June 30, 1933, for \$1,000, should have been allowed, and therefore, the case is reversed and remanded with directions that the motion to vacate be allowed, and the judgment entered on June 30, 1932, for the plaintiff for \$1,000 be set aside and the case proceed to a hearing upon the evidence to be offered by the parties.

REVERSED AND REMANDED WITH DIRECTIONS.

WILSON AND HALL, JJ. CONCUR.

... have been admitted into the record, and from the date of the entry of the judgment entered promptly in granting the motion to vacate the judgment entered the record. It also appears from the affidavit that the attorney representing the defendant would have been present on the morning of the trial, but owing to illness was prevented from appearing at the time the case was reached on the trial. He was notified that his defendant was prepared to offer its defense, and no doubt would have presented its defense by witnesses but for the illness of its attorney. The issue in this case is as to the ownership of the automobile in question. The defense is that the defendant had title to the chattels in question and was in possession of the same, and this was an issue of fact to be determined from the evidence upon the trial of the case. For the reasons stated, the motion of the defendant to vacate the judgment entered on June 30, 1932, for \$1,000, should have been allowed, and therefore, the case is reversed and remanded with directions that the motion to vacate be allowed, and the judgment entered on June 30, 1932, for the plaintiff for \$1,000 be set aside and the case proceed to be tried upon the evidence to be offered by the parties.

REVEREND JUDGE AND CLERK OF THE COURT.

ALLISON AND BAIL, JR., CLERK.

37261

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

TERRY TERRILL (Impleaded)

Plaintiff in Error.

WRIT OF ERROR TO

CRIMINAL COURT

COOK COUNTY.

278 I.A. 619²

Opinion filed Dec. 19, 1934

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The defendant by writ of error directed to the Criminal Court of Cook County seeks to review the record, from which it appears that a judgment was entered finding the defendant guilty of receiving stolen property. A hearing was had before the court without a jury, a jury having been waived, and the court imposed a sentence of one year in the house of correction and a fine of \$100 and costs.

The indictment upon which the defendant was tried contained five counts. The first count charged the defendant with the theft of a motor vehicle; the second count, charged the theft of a truck; and the third count, charged the defendant with receiving stolen property for his own gain and to prevent the owner from again possessing the property, the owner being Birk Fellingner, a corporation; the fourth count charged the defendant with driving a motor vehicle upon a street without the consent of the owner; and the fifth count charged the defendant with ^{receiving} stolen property in the language of the criminal code.

The defendant was arraigned, and entered a plea of not guilty, and by agreement of the defendant and the state's attorney, trial by jury was waived and the cause submitted to the court for a hearing. At the conclusion of the hearing the court entered a finding, which was as follows:

"Doth find the said defendant, Terry Terrill, guilty of receiving stolen property - value of property \$14.50."

37201

TO BE FILED IN

RECORD OF THE COURT OF COMMONS

COMMONS COURT

Defendant in error

v.

TERRY TERRY (Indebted)

JOHN C. CROFT

Plaintiff in error

288 L.A. 619

Opinion filed Dec. 19, 1934

MR. PRESIDING JUDGE HAVE RECEIVED THE OPINION OF THE COURT.

The defendant by writ of error directed to the original Court of Cook County asks to review the record, from which it appears that a judgment was entered finding the defendant guilty of receiving stolen property. A hearing was had before the court without a jury, a jury having been sworn, and the court passed a sentence of one year in the house of correction and a fine of 100 and costs.

The indictment upon which the defendant was tried contained five counts. The first count charged the defendant with the theft of a motor vehicle; the second count, charged the theft of a truck; and the third count, charged the defendant with receiving stolen property for his own gain and to prevent the owner from again possessing the property, the owner being Birch Kellinger, a corporation; the fourth count charged the defendant with driving a motor vehicle upon a street without the consent of the owner; and the fifth count charged the defendant with ^{receiving} stolen property in the language of the original code.

The defendant was arraigned, and entered a plea of not guilty, and by agreement of the defendant and the state's attorney, trial by jury was waived and the cause submitted to the court for a hearing. At the conclusion of the hearing the court entered a finding, which was as follows:

"Both find the said defendant, Terry Terry, guilty of receiving stolen property - value of property \$14.00."

The court further found the age of the defendant to be eighteen years.

Upon disposing of the motion for a new trial, the court again entered a finding in words and figures as follows:

"And the court being fully advised in the premises doth find the said defendant, Terry Terrill, guilty of receiving stolen property - value of property \$14.50."

and judgment of the court was entered in words and figures as follows:

"Therefore, it is considered, ordered and adjudged by the court that the defendant, Terry Terrill, is guilty of the same crime of receiving stolen property knowing the same to be stolen for the defendant's own gain and to prevent the owner from again possessing the same - value of property \$14.50 upon the indictment in this cause, on said finding of guilty, etc."

On June 23, 1933, the motion of the defendant to vacate the judgment entered by the court was overruled. There being no bill of exceptions included in the record, the presumption follows that the evidence established beyond a reasonable doubt the material facts upon which judgment was entered by the court.

The only question before this court is the one raised by the defendant, and that is that the finding of the court that the defendant was guilty of receiving stolen property, as above stated, is not a finding that the defendant was guilty of any crime known to the laws of the State of Illinois, and therefore is void. The record does not disclose that objections were made by the defendant to any of the proceedings properly before the trial court other than indicated in this opinion. We can all agree that if the judgment is void for the reasons stated, then the presumption that there was evidence which justified the court in finding the defendant guilty is of no avail. In order to determine whether the finding of the court is not sufficient to sustain the judgment it will be necessary to consider the indictment, finding and judgment of the court. The finding of the court should be reasonably construed and should not be set aside unless the court failed to find upon a

The court further found that the defendant was guilty of the crime charged.

Upon disposing of the motion for a new trial, the

court again entered a finding in favor of the defendant as follows:

"And the court being fully advised in the premises doth find the said defendant, Terry Textill, guilty of receiving stolen property - value of property, \$14.00."

and judgment of the court was entered in words and figures as follows:

"Therefore, it is considered, ordered and adjudged by the court that the defendant, Terry Textill, is guilty of the same crime of receiving stolen property knowing the same to be stolen for the defendant's own gain and to prevent the order from again possessing the same - value of property \$14.00 upon the indictment in this case, on said finding of guilty, etc."

On June 27, 1933, the motion of the defendant to vacate

the judgment entered by the court was overruled. There being no bill

of exceptions included in the record, the prescription follows that

the evidence established beyond a reasonable doubt the material

facts upon which judgment was entered by the court.

The only question before this court is the one raised

by the defendant, and that is that the finding of the court that

the defendant was guilty of receiving stolen property, as above

stated, is not a finding that the defendant was guilty of any crime

known to the laws of the State of Illinois, and therefore is void.

The record does not disclose that objections were made by the defend-

ant to any of the proceedings properly before the trial court other

than indicated in this opinion. We can all agree that if the judgment

is void for the reasons stated, then the presumption that there

was evidence which justified the court in finding the defendant

guilty is of no avail. In order to determine whether the finding

of the court is not sufficient to sustain the judgment it will be

necessary to consider the indictment, finding and judgment of the

court. The finding of the court should be reasonably construed and

should not be set aside unless the court failed to find upon a

material issue involved. While the finding of the court is informal, its meaning is plain. The defendant was charged with receiving stolen property, knowing the same to have been stolen. The finding being reasonably construed, we have as a fact that the defendant was in possession of stolen property, and the judgment clearly contains a finding upon each element necessary to sustain the conviction, and judgment entered by the court should not be set aside where from the whole record the meaning of the words used is clear. The People v. Patrick, 277 Ill. 210.

The judgment in this case will therefore be affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

material issue involved, while the finding of the court is informal, its meaning is plain. The defendant was charged with receiving stolen property, knowing the same to have been stolen. The finding being reasonably certain, we have no doubt that the defendant was in possession of stolen property, and the judgment of the court is a finding upon each element necessary to establish the conviction, and judgment entered by the court should not be set aside where from the whole record the meaning of the words used is clear. The People v. Patrick, 277 Ill. 410.

The judgment in this case will therefore be affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

37335

PEOPLE OF THE STATE OF ILLINOIS, ex rel.,
JOHN S. RUSCH,

Defendant in Error,

v.

WILLIAM FORD,

Plaintiff in Error.

WRIT OF ERROR

COUNTY COURT

278 I.A. 619³

COOK COUNTY.

Opinion filed Dec. 19, 1934

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The defendant upon a writ of error directed to the County Court of Cook County seeks to review an order entered by the County Court adjudging defendant in contempt of court, and imposing a sentence of one year imprisonment in the county jail for a violation of the election laws.

A petition was filed on August 10, 1933, in the County Court of Cook County by one John S. Rusch, Chief Clerk of the Board of Election Commissioners of the City of Chicago, charging that the defendant was judge of election in the 11th precinct of the 47th Ward, Chicago, at a general election held on November 8, 1932; that the defendant and other poll officials of said precinct while serving as judges and clerks of election in said precinct did fraudulently and unlawfully make a false canvass, tally, proclamation and return of the votes cast by the registered voters in said precinct in said election, and were guilty of corrupt and fraudulent conduct and practice in the duty performed by them. A rule to show cause was entered, and after a hearing before the court in the presence of the defendant, the trial judge, on October 30, 1933, entered an order finding that at a general election held on November 4, 1930, the defendant and other officials acting as judges and clerks at said election, fraudulently and unlawfully made a false canvass and

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and of interest were to the same to the same

County Court of Cook County, Illinois, at Chicago, Illinois.

The County Court of Cook County, Illinois, do hereby certify that the foregoing is a true and correct copy of the original as the same appears in the records of said County Court.

In testimony whereof, I have hereunto set my hand and the seal of said County Court at Chicago, Illinois, this 1st day of January, A.D. 1907.

Judge of the County Court.

On October 10, 1930, in the County Court of Cook County by one John A. Bush, Clerk of the Board of Election Commissioners of the City of Chicago, advising that the defendant was guilty of election in the 11th Precinct of the 47th Ward Chicago, at a general election held on November 3, 1929; that the defendant and other officials of said precinct while serving as judges and clerks of election in said precinct and fraudulently and unlawfully gave a false canvass, tally, proclamation and return of the votes cast by the registered voters in said precinct in said election, and the guilty of corrupt and fraudulent conduct and practice in the duty entrusted to them. It was so ordered and entered, and after reading before the Court in the presence of the defendant, the said John A. Bush, on October 30, 1930, entered an order finding that at a general election held on November 3, 1929, the defendant and other officials acting as judges and clerks at said election, fraudulently and unlawfully gave a false canvass and

return of the votes cast by the registered voters in said precinct; that the defendant and the other election officials were guilty of misconduct and misbehavior as officers of the County Court of Cook County. The defendant was sentenced to imprisonment for one year in the county jail of Cook County and the other judges and clerks were found guilty and fined \$150 each.

Upon the trial, it was stipulated and agreed by the respective parties in the proceeding that the judges and clerks named in the petition acted as judges and clerks in the 11th precinct of the 47th Ward at a general election held on November 8, 1932, in the City of Chicago, Illinois, and that a recount directed by the county judge showed discrepancies, as set forth in the petition.

There were also offered and received in evidence Exhibits 1, 2, 3 and 4, being the two poll books and the tally sheets, and the result of the recount of the ballots in the contest entitled Heller v. Hasten, a case then pending in the County Court, was admitted in evidence in lieu of a further recount.

The discrepancies as shown by the recount were in favor of certain candidates for judges of the Municipal Court of Chicago, who received from 75 to 114 more votes than were cast by the registered voters and put in the ballot box, and as to all the other candidates, who received from 31 to 79 fewer votes than were cast by the registered voters and tallied for them.

The defendant acted as judge at the general election, together with the other election officials named, and testified that he had served as judge of election three or four times, and from the evidence it appears that on the day in question, after the polls were closed, the ballot box was opened and the ballots removed; and that the defendant called, from the separate judicial ballots, the names of the candidates receiving votes to a Mrs. Mollie Howard, also a judge of election, and she tallied the votes upon a separate sheet

return of the vote cast by the registered voters in said precinct; that the defendant and the other election officials were guilty of misconduct and misbehavior as officers of the County Court of Cook County. The defendant was sentenced to imprisonment for one year in the county jail of Cook County and the other judges and clerks were found guilty and fined \$100 each.

Upon the trial, it was stipulated and agreed by the respective parties in the proceeding that the judges and clerks named in the petition were the judges and clerks in the 11th precinct of the 47th Ward at a general election held on November 9, 1887, in the City of Chicago, Illinois, and that a recount directed by the county judges showed discrepancies as set forth in the petition.

There were also offered and received in evidence Exhibits A, B, C and D, being the two poll books and the tally sheets, and the result of the recount of the ballots in the precinct entitled Heller v. Heston, a case then pending in the County Court, was admitted in evidence in lieu of a further recount.

The discrepancies as shown by the recount were in favor of certain candidates for judges of the Municipal Court of Chicago, who received from 75 to 114 more votes than were cast by the registered voters and not in the ballot box, and as to all the other candidates, who received from 31 to 73 fewer votes than were cast by the registered voters and tallied for them.

The defendant acted as judge at the general election together with the other election officials named, and testified that he had served as judge of election three or four times, and from the evidence it appears that on the day in question, after the polls were closed, the ballot box was opened and the ballots removed; and that the defendant called, from the separate judicial ballots, the names of the candidates receiving votes to a Mrs. Willie Howard, also a judge of election, and she tallied the votes upon a separate sheet

of paper as announced by the defendant. The defendant testified that he did not watch Mrs. Howard as to whether she tallied the votes so called by him from the ballots, and was unable to account for the discrepancies. Mrs. Howard, however, testified that she tallied the votes as announced by the defendant. It also appears from the evidence that the other judges and clerks of election were counting the big ballots so called and cast at this general election. It also appears from the evidence that Mrs. Howard turned over to Elsie Johnson, one of the clerks, the sheet of paper upon which she tallied the votes for the judicial candidates, and that the total vote for these candidates was entered upon the tally sheets.

The judges and clerks after acceptance of a commission issued by the County Court of Cook County to act as judges and clerks of the election become officers of the court, and shall be held to be liable upon complaint for misbehavior in the exercise of their office, and failing to perform their respective duties as provided for by the election law, the complaint will be tried in open court in a summary manner on oral testimony. Chapter 46, Para. 317 of an act entitled "Election Law" Cahill's Ill. Rev. Stat. 1939, provides for the method to be followed in the canvass of votes cast by the registered voters after the closing of the polls on election day, and it is apparent that the judges and the clerks in question did not follow or comply with the election law. The method to be followed provides, in substance, that the judges shall act jointly after the removal of the ballots from the ballot box; shall examine the ballots and separate the ballots containing the names of the same candidates, and the offices designated, into separate piles, which shall be counted in tens and announced by the judges to the clerks, who shall tally the same upon the tally sheets. Then the judges shall canvass

of paper as announced by the defendant. The defendant testified that he did not vote for Mr. Howard as he failed to fill the votes so called by him from the ballot, and was unable to account for the discrepancy. Mr. Howard, however, testified that she failed to vote as announced by the defendant. It also appears from the evidence that the other judges and clerks at election were counting the ballots as called and cast at that general election. It also appears from the evidence that Mr. Howard turned over to Miss Johnson, one of the clerks, the sheet at which upon which she tallied the votes for the judicial candidates, and that the total vote for these candidates was entered upon the tally sheets.

The judges and clerks after acceptance of a commission issued by the County Court of Cook County to act as judges and clerks of the election became officers of the court, and shall be held to be liable upon complaint for misconduct in the exercise of their office, and failing to perform their respective duties as provided for by the election law, the complaint will be tried in open court in a summary manner on oral testimony. Chapter 46, Sec. 214 of an act entitled "Election Law" (Ill. Rev. Stat. 1905), provides for the method to be followed in the canvass of votes cast by the registered voters after the closing of the polls on election day, and it is apparent that the judges and the clerks in question did not follow or comply with the election law. The method to be followed provides, in substance, that the judges shall act jointly after the removal of the ballots from the ballot box; shall examine the ballots and separate the ballots containing the names of the same candidates, and the officers separated into separate files, which shall be counted in turn and announced by the judges to the clerks, who shall tally the same upon the tally sheets. Then the judges shall canvass

each of the ballots usually called "split" or "scratched" ballots, by calling the name of each candidate and the office designated and voted for, and the clerks of the election shall tally the same. Upon conclusion of the canvass, the clerks shall compare the votes received by each candidate, and when the clerks shall agree upon the number, the votes tallied and received by the candidates shall be so announced. It was certainly not in compliance with the election law for the judges and clerks in the precinct in question to act separately and to canvass the votes as was done in this case. The defendant separately and apart from the other officials assumed to canvass the judicial ballots cast at the election, which conduct was a flagrant disregard of the law, and misbehavior such as would justify punishment for contempt of court by the County Court of Cook County.

It is also contended that the guilt of the defendant was not established from the evidence to be beyond a reasonable doubt. This court has adopted the rule stated in the case of People, ex rel, v. Kotwas, General No. 37334, in these words:

"In a contempt case of this kind we think the petitioner is not required to prove the guilt of the respondents beyond a reasonable doubt, but is required to produce 'most convincing evidence of the truth of the charge' before the respondents can be found guilty, the proceeding being quasi-criminal. Cehler v. Levy, 168 Ill. App. 41."

The evidence in the instant case is sufficient to justify the order entered by the court.

It has been called to our attention by the defendant that judgment and sentence are not responsive to the offense with which the defendant is charged, and after term time the court, without jurisdiction, amended the judgment order. The ground for defendant's contention is that he is charged with a contempt of court for misbehavior as an officer of the court; that the misconduct

is alleged to have taken place on November 8, 1932, whereas the judgment of the court is for misconduct and misbehavior that occurred on November 4, 1930. There is no question that the court amended the judgment order after term time to show the true date of the election, which was held on November 8, 1932, and not on November 4, 1930. There is no dispute that the election was held on November 8, 1932, and this date was stipulated by all the parties in open court, which of course included the defendant. It would be a strained construction for this court to hold there was not a sufficient memorandum from which the trial court could amend the judgment order and thereby fix the true date, which date was admitted by the defendant to be the date upon which the election was held. The judgment will be affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

is alleged to have been placed in the hands of the
 judgment of the court is for argument and observation that
 occurred on November 4, 1930. There is no question that the court
 amended the judgment order after that time to show the true date
 of the election, which was held on November 3, 1930, and not on
 November 4, 1930. There is no dispute that the election was held
 on November 3, 1930, and this date was stipulated by all the parties
 in open court, which of course included the defendant. It would be
 a strained construction for this court to hold there was not a
 sufficient memorandum from which the trial court could amend the
 judgment order and thereby fix the true date, which date was
 admitted by the defendant to be the date upon which the election was
 held. The judgment will be affirmed.

JUDGMENT AFFIRMED.

WILSON AND SULL, JJ. CONCUR.

37344

SARA SOMACH,

Plaintiff- Appellee,

v.

GREEN BOX CO., INC.,

Defendant - Appellant.

APPEAL FROM THE

CIRCUIT COURT OF

COOK COUNTY.

278 I.A. 620

Opinion filed Dec. 19, 1934

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The defendant appealed from a judgment entered by the court in favor of the plaintiff on the verdict of the jury for \$3,000. This is an action instituted by the plaintiff to recover damages for injuries sustained by reason of an automobile accident. The cause now in this court was the second trial of the issues, which resulted in a verdict and judgment for the plaintiff. No question is raised as to the sufficiency of the pleadings.

The facts are that the accident occurred on April 6, 1931, about 5.45 P.M., at the intersection of Armitage and Albany avenues, which streets are located in the northwest part of the City of Chicago. At the time of the accident the weather was clear and the street dry. Armitage Avenue is 38 feet wide, and runs east and west. Upon this street are two street car tracks for east and westbound street car traffic. Armitage avenue is paved, also Albany avenue, which is a residential street 30 feet wide, extends north and south, and intersects Armitage avenue at right angles. The automobile that collided with the plaintiff was traveling in a westerly direction on Armitage avenue on the westbound car tracks. This automobile was being driven by one Peterson, a salesman for the defendant company, and seated in the car with him was one Karlman, a co-employee.

The conflict in the evidence is as to where the plaintiff was at the time of the accident.

37344

Plaintiff -

v.

Defendant -

Defendant -

Plaintiff -

Plaintiff -

Plaintiff -

288 A.A. 020

Opinion filed Dec. 19, 1934

Mr. Justice delivered the opinion of the court.

The defendant appealed from a judgment entered by the court in favor of the plaintiff on the verdict of the jury for \$3,000. This is an action instituted by the plaintiff to recover damages for injuries sustained by reason of an automobile accident. The case now in this court was the second trial of the issue, which resulted in a verdict in judgment for the plaintiff. No question is raised as to the sufficiency of the evidence.

The facts are that the accident occurred on April 5, 1931, about 6:45 a.m., at the intersection of Limpage and Albany avenues, which streets are located in the northwest part of the City of Chicago. At the time of the accident the weather was clear and the street dry. Limpage Avenue is 32 feet wide, and runs east and west. Upon this street are two street car tracks for east and westbound street car traffic. Limpage Avenue is also Albany Avenue, which is a residential street 30 feet wide, extends north and south, and intersects Limpage Avenue at right angles. The automobile that collided with the plaintiff was traveling in a westerly direction on Limpage Avenue on the westbound car tracks. This automobile was being driven by one Peterson, a salesman for the defendant company, and seated in the car with him was one Larman, a co-employee.

The conflict in the evidence is as to where the plaintiff was at the time of the accident.

The evidence of the plaintiff is to the effect that as she walked west from the southeast to the southwest corner of the intersection she saw a street car, which had been standing at the southwest corner, start up and go east; that at the southwest corner she looked west, saw no traffic, looked east, saw an automobile coming toward her a block away; that she walked north across Armitage avenue on the crosswalk and noticed that the street car was not then in sight; that as the plaintiff crossed the eastbound car tracks she looked east again and saw the automobile driven by Peterson, the salesman for the defendant, coming toward her in the westbound car tracks; that at the time, the automobile was from 15 to 20 feet from the plaintiff, and was traveling at a speed from 35 to 40 miles an hour; that plaintiff heard no warning signal or noise from the application of the brakes; that the automobile did not slacken its speed, and the car struck the plaintiff and she was injured; that she did not remember anything further until she was taken from under the automobile.

The defendant offered the evidence of Peterson, the driver of the car, who was employed by the defendant as a salesman. Peterson testified that at the time of the accident he was driving with Karlman in the car, west on Armitage, after his day's work, and as they approached the intersection of Armitage and Albany avenues he saw a street car headed east, standing back from the intersection; that an automobile had stopped in front of the street car so that it could not make a regular cross stop; that Peterson was driving in the westbound car rails, and as they passed through the intersection and continued driving in the rails, he drove the car at a speed of about 15 miles an hour, and as the automobile arrived at a point almost at the west end of the street car, which was still standing back of the intersection, the plaintiff, came out from behind the street car; that Peterson immediately applied the brakes,

The evidence of the Plaintiff is to the effect that as she looked west from the southeast to the southwest corner of the intersection across a street east, which had been standing at the southwest corner, that at the southwest corner she looked west, saw no traffic, looked east, saw an automobile coming toward her from the west, and noticed that the street car was not then in sight; that as the Plaintiff crossed the eastbound car tracks she looked east again and saw the automobile driven by Peterson, the salesman for the defendant, coming toward her in the westbound car tracks; that at the time, the automobile was from 15 to 20 feet from the Plaintiff, and was traveling at a speed from 25 to 40 miles an hour; that Plaintiff heard no warning signal or noise from the application of the brakes; that the automobile did not slacken its speed, and the car struck the Plaintiff and she was injured; that she did not remember anything further until she was taken from under the automobile.

The defendant called the evidence of Peterson, the driver of the car, who was employed by the defendant as a salesman. Peterson testified that at the time of the accident he was driving with William in the car, went on nights, after his day's work, and as they approached the intersection of Armistead and Albany avenues he saw a street car headed east, standing back from the intersection; that an automobile had stopped in front of the street car so that it could not make a regular cross stop; that Peterson was driving in the westbound car rails, and as they passed through the intersection and continued driving in the rails, he drove the car at a speed of about 15 miles an hour, and as the automobile arrived at a point almost at the west end of the street car, which was still standing back of the intersection, the Plaintiff, came out from behind the street car; that Peterson immediately applied the brakes,

and swerved the automobile, which struck the plaintiff, who was about 4 or 5 feet west of the west end of the street car.

There was evidence by Karlman and Schmidt. Karlman was riding in the car with Peterson at the time of the accident. He testified the plaintiff was picked up after the accident 150 to 200 feet from the northwest corner of the intersection. Schmidt testified that he was driving east on Armitage avenue toward the scene of the accident at the time it happened. Schmidt saw the street car as he passed through the intersection of Armitage and Kedzie, a block west of Albany avenue. He was at a point about 100 feet west of the street car, which was standing back from the intersection of Albany avenue when the plaintiff stepped out from behind it into the path of Peterson's automobile, and he was looking at her when the accident happened.

One of the questions is: Was Peterson, the driver of the automobile, acting in the course of his employment with the defendant at the time the accident occurred? From the facts as they appear in the record, Peterson entered the employment of the Green Box Company, the defendant, during the latter part of 1929. His employment continued until sometime in 1932.

The defendant had offices at 1840 Carroll Avenue, in the City of Chicago, and was engaged in the manufacture of wooden shipping boxes or crates, which were used for the shipping of goods. Orders for these boxes or crates were obtained through the solicitation of salesmen, and Peterson was employed for the purpose of soliciting such orders.

Under the terms of Peterson's employment he was paid a salary by the Green Box Company of \$200 per month, and received no other compensation. In addition to the \$200 per month salary, Peterson was given the use of the company's automobile, which he

and swerved the automobile, which struck the plaintiff, who was about 5 or 6 feet west of the west end of the street car.

There was evidence by Karlin and Schmidt. Karlin

was riding in the car with Peterson at the time of the accident. He

testified the plaintiff was picked up after the accident 150 to 200

feet from the northwest corner of the intersection. Schmidt testified

that he was driving east on Armitage avenue toward the scene of

the accident at the time it happened. Schmidt saw the street car

as he passed through the intersection of Armitage and Kedzie, a

block west of Albany avenue. He was at a point about 100 feet west

of the street car, which was standing back from the intersection of

Albany avenue when the plaintiff stepped out from behind it into

the path of Peterson's automobile, and he was looking at her when

the accident happened.

One of the questions is: Was Peterson, the driver of

the automobile, acting in the course of his employment with the

defendant at the time the accident occurred? From the facts as

they appear in the record, Peterson entered the employment of the

Green Box Company, the defendant, during the latter part of 1932.

His employment continued until sometime in 1933.

The defendant had offices at 1840 North La Salle avenue, in

the City of Chicago, and was engaged in the manufacture of wooden

shipping boxes or crates, which were used for the shipping of goods.

Orders for wooden boxes or crates were obtained through the solici-

tation of salesmen, and Peterson was employed for the purpose of

soliciting such orders.

Under the terms of Peterson's employment he was paid

a salary by the Green Box Company of \$200 per month, and received

no other compensation. In addition to the \$200 per month salary,

Peterson was given the use of the company's automobile, which he

used in the regular business of the defendant during business hours. His business hours, or hours of work, were from 9:00 o'clock in the morning until 4:30 or 5:00 o'clock in the afternoon. Under his arrangement with the Green Box Company, this automobile was used by Peterson in going to work from his home and in returning after closing hours. After the day's work was finished at 5 o'clock in the evening on the day in question, Peterson left the plant of the defendant to return to his home, and was driving this automobile at the time of the accident. The general upkeep of the car, including gasoline, oil and minor repairs, during business hours was paid for by the Green Box Company, but Peterson paid the expense of gasoline, oil and repairs incurred by him in driving the car at other times than during business hours. At the time the accident occurred a sample box was in the rear of the car on the floor, and this box was of the same general type of wooden box as that manufactured by the defendant, and used by Peterson to induce sales to prospective purchasers.

The question as to whether Peterson in driving the automobile was acting as the agent of the defendant and using the car in the course of his employment at the time the injury was sustained, is largely one of fact, and one to be determined by the jury, guided by proper instructions of the court. There is the admission by the defendant that it owned the automobile. At the time of the accident the automobile was being driven by Peterson, with the consent of the defendant, and used by him to reach his home. Peterson stored the automobile, by arrangement with Mr. Green of the defendant company, in a garage in the rear of Peterson's home.

As we have stated, the employee Peterson was driving the car home and it was a part of his duty to store this car. The question of the use of the car by Peterson at times other than during

used in the regular business of the defendant during business hours.

His business hours, or hours of work, were from 9:00 o'clock

in the morning until 4:30 or 5:00 o'clock in the afternoon. Under

his arrangement with the Green Box Company, this automobile was

used by Peterson in going to work from his home and in returning

after closing hours. After the day's work was finished at 5 o'clock

in the evening on the day in question, Peterson left the plant of

the defendant to return to his home, and was driving this automobile

at the time of the accident. The general upkeep of the car,

including gasoline, oil and minor repairs, during business hours was

paid for by the Green Box Company, but Peterson paid the expense

of gasoline, oil and repairs incurred by him in driving the car at

other times than during business hours. At the time the accident

occurred a maple box was in the rear of the car on the floor, and

this box was of the same general type of wooden box as that manufac-

tured by the defendant, and used by Peterson to induce sales to

prospective purchasers.

The question as to whether Peterson in driving the

automobile was acting as the agent of the defendant and using the

car in the course of his employment at the time the injury was sus-

tained, is largely one of fact, and one to be determined by the jury,

guided by proper instructions of the court. There is the testimony

by the defendant that it owned the automobile. At the time of the

accident the automobile was being driven by Peterson, with the consent

of the defendant, and used by him to reach his home. Peterson stored

the automobile, by arrangement with Mr. Green of the defendant company,

in a garage in the rear of Peterson's home.

As we have stated, the employee, Peterson was driving

the car home and it was a part of his duty to store this car. The

question of the use of the car by Peterson at times other than during

business hours is not material or helpful in passing upon the question whether the car was driven by Peterson in the course of his employment at the time of the accident. From the facts as we view them, we believe it was a part of Peterson's duty to drive the car at the time.

It is also contended by the defendant that the court erred in overruling defendant's motion for a new trial, on the ground that the verdict is against the manifest weight of the evidence.

The evidence is conflicting as to whether the plaintiff was injured upon the crosswalk at the intersection by the negligent driving of the automobile by the defendant's agent, or whether she was passing around the rear of the street car standing at the intersection and stepped in front of the car being driven by Peterson, and was injured. The facts were before the jury, and it was for the jury to decide as to the credibility of the witnesses and the weight of the evidence, and whether the proof established that the plaintiff was in the exercise of due care and caution for her own safety, and that the defendant was guilty of the negligence alleged. We believe that the evidence was sufficient and justified the verdict of the jury and the judgment entered by the court.

Finally, the defendant contends that the court erred in refusing to grant a new trial on the ground that one of the jurors was intoxicated. The judge presiding at the trial called attention to the attorneys that something was wrong with one of the jurors and stated that the bailiff thought the juror had been drinking. There was some discussion as to the juror's condition, and finally the trial proceeded to a conclusion, without any objection having been made by any of the parties. The trial court in proceeding with the trial exercised its discretion, and in passing upon the question as to the condition of the juror, was in a much better position than

business hours is not unusual or helpful in passing upon the question whether the car was driving by Peterson in the course of his employment at the time of the accident. From the facts as we view them, we believe it was a part of Peterson's duty to drive the car at the time.

It is also contended by the defendant that the court erred in overruling defendant's motion for a new trial, on the ground that the verdict is against the manifest weight of the evidence. The evidence is conflicting as to whether the plain-

tiff ran inland upon the crosswalk at the intersection by the negligent driving of the automobile by the defendant's agent, or whether she was passing around the rear of the street car standing at the intersection and stopped in front of the car being driven by Peterson, and was injured. The facts were before the jury, and it was for the jury to decide as to the credibility of the witnesses and the weight of the evidence, and whether the proof established that the defendant was in the exercise of due care and caution for her own safety, and that the defendant was guilty of the negligence alleged. We believe that the evidence was sufficient and justified the verdict of the jury and the judgment entered by the court.

In all, the defendant contends that the court erred in refusing to grant a new trial on the ground that one of the jurors was intoxicated. The judge presiding at the trial called attention to the testimony that something was wrong with one of the jurors and stated that the juror had been drinking. There was some discussion as to the juror's condition, and finally the trial proceeded to a conclusion, without any objection having been made by any of the parties. The trial court in proceeding with the trial exercised its discretion, and in passing upon the question as to the condition of the juror, was in a much better position than

is this court. Therefore, we are loath to say that the trial court erred upon this question. Graybeal, et al. v. Gardner et al., 48 Ill. App. 305. The defendant did not complain, but continued with the trial and submitted its cause, and hoped for a favorable verdict. Having speculated as to a favorable outcome and lost, he cannot at this time complain.

Finding no reversible error in the record, the judgment will be affirmed.

JUDGMENT AFFIRMED.

WILSON AND HALL, JJ. CONCUR.

in this matter. Therefore, it is the duty of the jury to find the defendant guilty of the crime charged in the indictment. The defendant did not complain, but continued with the trial and submitted the case, and asked for a favorable verdict. Having requested a verdict in favor of the defendant, he cannot at this time complain.

There is no reversible error in the record, the

judgment will be affirmed.

TESTIMONY.

WITNESSES.

36697

CLARENCE F. BUCK, as Receiver of
CALUMET NATIONAL BANK OF CHICAGO,

(Plaintiff) Appellee,

v.

ROBERT HONORE BROWN,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

278 I.A. 620²

Opinion filed Dec. 19, 1934

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On November 29th, 1932, a judgment in the sum of \$1,767.82 was entered against defendant in the Circuit Court of Cook County on a judgment note for \$1,500.00 executed by defendant, dated December 16th, 1931, and payable to the Calumet National Bank. The note provided for the payment of interest after maturity until paid at the rate of 7% per annum, together with reasonable attorneys fees. The judgment included the amount of the face of the note, interest thereon, and attorneys fees of \$150.00. The judgment is in favor of Clarence F. Buck, receiver of the Calumet National Bank. On December 7th, 1932, defendant filed a verified petition in the Circuit Court, praying that the judgment by confession be vacated and set aside, or, in the alternative, that judgment and execution be stayed, and that petitioner be given leave to plead and defend on the merits of the case.

The petition is in substance that the note in question was executed by the defendant in blank, and as a renewal of a series of other notes; that the defendant received no consideration for the note upon which judgment was confessed; that at the time of the execution of the original note, of which the note upon which judgment was confessed is a renewal, defendant was engaged in clearing up the title to some real estate in which the Calumet National Bank had a substantial investment and interest, and that in connection with the clearing up of the title to the property, it was necessary for the Calumet National Bank to expend through the defendant various sums of

CLARENCE E. BUCK, receiver of
CALUMET NATIONAL BANK, Plaintiff,

(Defendant),

v.

ROBERT HENSON BUCK, Defendant,

(Plaintiff).

Opinion filed Dec. 19, 1934

MR. JUSTICE R. L. DELIVERANCE, Chief Justice of the Court.

On November 20th, 1934, a judgment in the sum of \$1,737.82

was entered against defendant in the Circuit Court of Cook County on

a judgment note for \$1,500.00 executed by defendant, dated December

18th, 1931, and payable to the Calumet National Bank. The note pro-

vided for the payment of interest after maturity until paid at the

rate of 7% per annum, together with reasonable attorneys fees. The

judgment included the amount of the face of the note, interest there-

on, and attorneys fees of \$150.00. The judgment is in favor of

Clarence E. Buck, receiver of the Calumet National Bank. On December

7th, 1933, defendant filed a verified petition in the Circuit Court,

praying that the judgment by confirmation be vacated and set aside, or,

in the alternative, that judgment and execution be stayed, and that

petitioner be given leave to plead and defend on the merits of the case.

The petition is in substance that the note in question was

executed by the defendant in blank, and as a renewal of a series of

other notes; that the defendant received no consideration for the

note upon which judgment was confessed; that at the time of the exe-

cution of the original note, of which the note upon which judgment

was confessed is a renewal, defendant was engaged in clearing up the

title to some real estate in which the Calumet National Bank had a

substantial investment and interest, and that in connection with the

clearing up of the title to the property, it was necessary for the

Calumet National Bank to expend through the defendant various sums of

money to pay off mechanics liens and other claims against certain real estate; that all of defendant's dealings with the bank were with Emil G. Seip, its president; that as such president, Seip represented to defendant that it would be advisable to carry the property in the name of an individual, and that various sums of money from time to time advanced by the bank should be evidenced as loans to this individual, and that defendant, with full confidence in the bank and its officers, agreed to and did execute various notes, mortgages and other evidences of indebtedness for the sole benefit of the bank; that at no time was the defendant the principal in the transaction, but at all times acted as agent and servant of the bank in taking title to the property, executing certain mortgages in connection therewith, erecting buildings thereon and clearing up titles to the real estate; that it was represented to the defendant by Seip, acting as president of the bank, that the bank would not look to defendant personally for the satisfaction of any of the loans; that pursuant to the arrangement set forth, defendant at various times executed various instruments at the request of and for the benefit of the bank, including the note in question; that in the latter part of 1930, defendant requested and was granted a loan of \$500.00 from the Calumet National Bank, and to evidence this loan he executed his promissory note for the sum of \$500.00, and after this latter note became due, this principal note - the note sued on - was executed in place of various other notes, that defendant deposited a mortgage in the sum of \$2,000.00 as security for the said sum of \$500.00, which was the actual amount of the loan to him by the bank, and that any amount over the sum of \$500.00 represented by the note in question was used and expended for the sole benefit of the Calumet National Bank, and that defendant received no consideration therefor, except the said sum of \$500.00, which, as defendant alleges, had been paid in full to the bank at the time of the entry of the judgment, as hereinbefore set forth.

money to pay off certain loans and to maintain certain real estate; that all of defendant's dealings with the bank were with the G. Selig, its president; that as such president, Selig represented to defendant that it would be advisable to carry the property in the name of an individual, and that various sums of money from time to time advanced by the bank should be evidenced as loans to this individual, and that defendant, with full confidence in the bank and its officers, agreed to and did execute various notes, mortgages and other evidences of indebtedness for the sole benefit of the bank; that at no time was the defendant the principal in the transaction, but at all times acted as agent and servant of the bank in taking title to the property, executing certain mortgages in connection therewith, erecting buildings thereon and clearing up titles to the real estate; that it was represented to the defendant by Selig, acting as president of the bank, that the bank would not look to defendant personally for the satisfaction of any of the loans; that pursuant to the arrangement set forth, defendant at various times executed various instruments at the request of and for the benefit of the bank, including the note in question; that in the latter part of 1930, defendant requested and was granted a loan of \$500.00 from the Calumet National Bank, and to evidence this loan he executed his promissory note for the sum of \$500.00, and after this latter note became due, this promissory note - the note used as - was executed in place of various other notes, that defendant deposited a mortgage in the sum of \$1,000.00 as security for the said sum of \$500.00, which was the actual amount of the loan to him by the bank, and that the amount over the sum of \$500.00 represented by the note in question was used and expended for the sole benefit of the Calumet National Bank, and that defendant received no consideration therefor, except the said sum of \$500.00, which, as defendant alleges, had been paid in full to the bank at the time of the entry of the judgment, as hereinafter set forth.

After the entry of the judgment, a garnishment proceeding was instituted thereon against the First National Bank of Chicago. Upon the presentation of the petition of defendant as hereinbefore set forth, in addition to the motion to open up the judgment, defendant moved that the garnishment proceeding be quashed, and the garnishee discharged. On December 10th, 1932, both motions were denied, and the court entered the following order:

"This cause coming on to be heard upon the defendant's motion to vacate the judgment heretofore entered herein by confession November 29, A. D. 1932, after arguments of counsel and due deliberation by the court, said motion is denied, to which the defendant excepts.

Thereupon this cause coming on to be heard upon the defendant's motion to quash the garnishment proceedings filed in said cause and to have the garnishee herein dismissed after arguments of counsel and due deliberation by the court, said motion is denied, to which the defendant excepts.

Thereupon the defendant having entered his exceptions herein, prays an appeal from the above orders of this court to the Appellate Court in and for the First District of the State of Illinois which is allowed upon filing herein his appeal bond in the penal sum of two hundred fifty dollars (\$250.00) to be approved by the court within thirty days from this date and sixty days' time from this date is hereby allowed the defendant in which to file his bill of exceptions herein."

After the record was filed here, plaintiff moved to dismiss the appeal upon the ground that a single appeal was taken from two separate final orders, instead of separate appeals from each order. This motion was reserved to the hearing.

The question for determination here is whether or not defendant, by his verified petition, states sufficient facts, which, if taken as true, present a meritorious defense. Defendant's brief is of no aid to the court on this question. The statement that defendant himself received no consideration for the note in question, in our opinion, is not sufficient. There is nothing in the petition which even suggests that the bank did not advance funds to the full amount of the note in consideration of its execution and delivery to the bank by defendant. Defendant states that in his dealings with the bank, and in the giving of the note, he was acting as the agent of

for the purpose of the judgment, a judgment proceeding was instituted against the First National Bank of Chicago, on the presentation of the petition of defendant as hereinbefore set forth, in addition to the action to open up the judgment, defendant moved that the judgment proceeding be quashed, and the writs be discharged. On November 14th, 1933, both motions were denied, and

the court entered the following order:

"This cause coming on to be heard upon the defendant's motion to vacate the judgment heretofore entered herein by the court on November 13, 1933, after arguments of counsel and the defendant by the court, said motion is denied, to which the defendant excepts."

Thereupon this cause coming on to be heard upon the defendant's motion to quash the judgment heretofore entered herein by the court on November 13, 1933, after arguments of counsel and the defendant by the court, said motion is denied, to which the defendant excepts."

Thereupon the defendant having entered his exceptions hereto, prays an appeal from the above order of this court to the Circuit Court in and for the first district of the State of Illinois which is allowed upon Illinois herein his appeal bond in the sum of two hundred fifty dollars (\$250.00) to be approved by the court within thirty days from this date and sixty days' time from this date is hereby allowed the defendant in which to file his bill of exceptions hereto."

After the record was filed here, plaintiff moved to dismiss the appeal upon the ground that a final appeal was taken from two separate final orders, instead of separate appeals from each order. This motion was reserved to the hearing.

The question for determination here is whether or not defendant, by his verified petition, states sufficient facts, which, if taken as true, present a meritorious defense. Defendant's brief is of no aid to the court on this question. The statement that defendant himself received no consideration for the note in question, in my opinion, is not sufficient. There is nothing in the petition which even suggests that the bank did not advance funds to the full amount of the note in consideration of its execution and delivery to the bank by defendant. Defendant states that in his dealings with the bank, and in the giving of the note, he was acting as the agent of

the bank. No sufficient facts in this regard are set forth in the petition to ascertain whether this is true or not, or that funds of the bank were not advanced by the bank in consideration of the note given by defendant.

In Gilmore v. German Savings Bank, 89 Ill. App. 442, the facts were similar to the alleged facts set up in the petition filed in this case. There a judgment had been obtained on a judgment note by confession, and a petition was filed in which it was prayed that the judgment be vacated and that the maker of the note be allowed to plead and make a defense. In the affidavit filed there, defendant stated he had never promised to pay the plaintiff any sum of money, nor was he indebted to plaintiff in any sum of money, and that no consideration of any kind or character had ever been given for the note. There were no other statements in the verified petition other than those just stated. As to whether or not defendant had a meritorious defense to the debt evidenced by the note, which had been merged in the judgment, the court said:

"The statement that he is not indebted to the bank is but his legal conclusion from the facts hereafter stated relative to plaintiff's title to the note. He does not state that he has executed the note without receiving any consideration therefor, but only that A. H. Warren, the payee, has never given any consideration for the note. If there was a consideration for the note moving from some third party, that would be adequate to support the note. An affidavit in support of such an application is to be construed most strongly against the party making the application. Facts should be stated which make out a meritorious defense, and not merely facts from which it is possible to infer such a defense. Chicago Fire Proofing Co. v. Park National Bank, 145 Ill. 481; Crossman v. Wohlleben, 90 Ill. 537. In the latter case defendant asked leave to plead, and set out by affidavit the facts which he claimed constituted a defense, and added an allegation that he had a good defense to the action upon the merits to the whole of plaintiff's demand. The court held the facts did not unequivocally show a defense on the merits, and affirmed a denial to the motion,, notwithstanding the general allegations of a meritorious defense. Here the facts attending the execution and delivery of this note by defendant are not stated."

To the same effect is the decision in Chicago Fire Proofing Co. v. Park National Bank, 145 Ill. 481, wherein the court said:

"In an application of this character, to vacate a judgment and for leave to plead, affidavits filed in support of

the bank. No authentication facts in this regard are set forth in the petition to ascertain whether this is true or not, or any facts that the bank were not advanced by the bank in authentication of the note given by defendant.

In Clifford v. American National Bank, 111 Ill. 448, 1894, facts were similar to the alleged facts set up in the petition filed in this case. There a judgment had been obtained on a judgment note by confession, and a petition was filed in which it was prayed that the judgment be vacated and that the maker of the note be allowed to plead and make a defense. In the affidavit filed there, defendant stated he had never promised to pay the plaintiff any sum of money, nor was he indebted to plaintiff in any sum of money, and that no consideration of any kind or character had ever been given for the note. There were no other statements in the verified petition other than those just stated. As to whether or not defendant had a written or oral defense to the debt evidenced by the note, which had been merged in the judgment, the court said:

"The statement that he is not indebted to the bank is but his legal conclusion from the facts hereafter stated relative to plaintiff's title to the note. He does not state that he has executed the note without receiving any consideration therefor, but only that 'I, the maker, the payee, has never given any consideration for the note.' If there was a consideration for the note moving from some third party, that would be sufficient to support the note. An affidavit in support of such an application is to be considered most strongly against the party making the application. Facts should be stated which make out a meritorious defense, and not merely facts that which it is possible to later show a defense. This is the principle of Clifford v. American National Bank, 111 Ill. 448, 1894, and Clifford v. American National Bank, 111 Ill. 448, 1894. In the latter case defendant sought to plead and set out a defense, and the facts were stated as constituted a defense, and stated in application that he had a good defense to the action upon the merits to the note of plaintiff's company. The court held the facts did not unambiguously show a defense on the merits, and affirmed a judgment to the contrary notwithstanding the general allegations of a meritorious defense. The facts stated in the application and delivery of the note by defendant are not stated."

To the same effect is the decision in Clifford v. American National Bank, 111 Ill. 448, 1894, wherein the court said: "In an application of this character, to vacate a judgment and to leave to plead, affidavits filed in support of

the motion are to be construed most strongly against the party making the application. It is not sufficient to state facts from which, if proved on a trial, a defense might be inferred. Crossman vs. Wohlleben, 90 Ill. 537. When the affidavits relied upon in this case are tested by the rule indicated, it is apparent no case was made out by the appellants."

We are of the opinion that the court was not in error in denying the motion to vacate the judgment and in refusing to allow the defendant to plead. In view of the fact that the judgment is affirmed, it will not be necessary for this court to pass upon the motion to dismiss the appeal.

JUDGMENT AFFIRMED

HEBEL, PJ, and WILSON, J, CONCUR

the mother was to be supported most strongly against the
 party making the application. It is not sufficient to state
 that from what is moved on a trial, a defense must be
 made. In the case of the mother, the mother was
 attacked upon in this case and tested by the wife
 instead, it is evident no case was made out by the
 applicant.

As one of the opinions that the court was not in error in
 denying the motion to vacate the judgment and in refusing to allow
 the defendant to plead. In view of the fact that the judgment is
 affirmed, it will not be necessary for this court to pass upon the
 motion to dismiss the appeal.

RECEIVED

RECEIVED, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

37093

FRANK J. KOHOUT, as Receiver of
BAKER STATE BANK, a Corporation,
and GLENS FALLS INDEMNITY COMPANY,
a corporation,

Appellants,

v.

F. FRAZIER JELKE, ALEXANDER M. MAIN,
OSCAR H. RIGGS, ROBERT J. FISCHER,
SIDNEY S. WORMSER, JOHN J. MOORE,
VICTOR G. PARADISE, GEORGE S. BRANNEN,
and WALTER H. CHURCH, doing business
as FRAZIER JELKE & CO., and ALBERT
G. LESTER, FORD R. CARTER, EDWIN T. WOOD,
JOHN ARTHUR and FRANK S. HANSEN, doing
business as LESTER, CARTER & CO.,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

278 I.A. 620³

Opinion filed Dec. 19, 1934

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by complainants from a decree of the Circuit Court of Cook County, sustaining general demurrers of certain defendants to complainants' amended and supplemental bill of complaint, dismissing the bill for want of equity, and decreeing that complainant pay costs of suit. In addition to the defendants demurring, two other defendants were included in the bill, namely, Thomas J. Nihill and J. Riley Hayes. Nihill filed an appearance, but did not plead, and Hayes failed to appear.

It is alleged that the defendants, Jelke, Main, Riggs, Fischer, Wormser, Moore, Paradise, Brannen and Church are members of a stock brokers firm, known as Frazier Jelke & Company, and that defendants, Lester, Carter, Wood, Arthur and Hansen, are members of a firm engaged in a like business, known as Lester, Carter & Company. The bill was filed January 16, 1930, by Frank J. Kohout, Receiver of the Baker State Bank, and the Glens Falls Indemnity Company, complainants, and charges in substance that from November, 1927, to June, 1929, Thomas J. Nihill was the cashier of the Baker State Bank, and that J. Riley Hayes was a customer's man, or solicitor employed by

and along FALLS ROAD, CITY OF NEW YORK,
INCORPORATED,

1895

57

T. F. LARSEN, JR.,
OSCAR E. HENRIKSON,
SIDNEY J. JOHNSON,
VICTOR G. JOYCE,
and WILLIAM H. JONES,
as TRUSTEES OF THE
G. LINDA A. JOYCE TRUST,
JOHN A. JOYCE AND
DAVIDSON & SONS,

* 3331374

Opinion filed Dec. 18, 1934

[illegible]

The bill was filed January 11, 1930, by Frank E. Konout, receiver of the Bank State Bank, and the claims which allegedly belong to plaintiffs, and charges in substance that from November, 1927, to June 1928, Edward J. Millill was the manager of the Bank State Bank, and that J. H. Hayes was a customer's agent or solicitor employed by

Frazier Jelke & Company; that between January, 1928, and June 9, 1929, Nihill and Hayes entered into and pursued an unlawful conspiracy between themselves, to unlawfully and secretly misappropriate and withdraw from the Baker State Bank large amounts of money, without the knowledge or consent of the bank, in order to use such money in stock speculations for the benefit of the two alleged conspirators; that beginning with January 3, 1928, Nihill gave Hayes orders for the purchase of large amounts of stock in various corporations for the purported account of the Baker State Bank for alleged customers of the bank, and that the purchase of most of these stocks, was unauthorized by the bank; that through Hayes many orders were given and stock purchases made from Frazier Jelke & Company; that such purchases were made with funds misappropriated by Nihill from the Baker State Bank, and that on June 9, 1929, and subsequently thereto, upon audits made of the books of the bank, a net shortage of \$85,211.48 was discovered, caused, as alleged, by the unlawful withdrawal of funds by Nihill, and in pursuance of the conspiracy with Hayes; that on October 10, 1929, the Glens Falls Indemnity Company, surety for the bank's loss, paid the bank \$50,000.00 in liquidation of its liability, and that the bank and surety company had entered into an agreement to the effect that any recoveries that might be brought about would be divided between the bank and the Indemnity Company, as provided by this agreement; that in pursuance of the conspiracy, Hayes, the customer's man of Frazier Jelke & Company, reported to his employer the receipt of orders to purchase certain stocks for the account of the Baker State Bank; that Nihill then falsified the books of the bank so that they indicated that a cashier's check of the bank had been issued in the regular course of the business for an alleged customer of the bank; that the purchase of such stocks was indicated to have been made by the bank, and that in case of a sale, the proceeds thereof were mailed to the bank and

Trasker Leake & Company; that between January, 1932, and June 3, 1932, Hill and Hayes either directly or indirectly had control of the bank; that between themselves, as a partnership and secretly through the bank, without withdrawing from the bank the bank's account of money, without the knowledge of account of the bank, in order to use said money in stock operations for the benefit of the two alleged conspirators; that beginning with January 1, 1932, Hill gave Hayes orders for the purchase of large amounts of stock in various corporations for the purported account of the bank; that the bank for alleged purposes of the bank, and that the purchase of stock of these stocks, was unauthorized by the bank; that through Hayes many orders were given and stock purchases made from Trasker Leake & Company; that such purchases were made with funds misappropriated by Hill from the bank's account, and that on June 3, 1932, and subsequently thereto, such funds were used for the purchase of two banks, a net amount of \$2,311.48 was transferred, a sum, as alleged, by the mutual withdrawal of funds by Hill, and in pursuance of the conspiracy with Hayes; that on October 17, 1932, the Vienna Film Indemnity Company, surety for the bank's loss, paid the bank \$50,000.00 in liquidation of its liability, and that the bank and surety company had entered into an agreement to the effect that any recoveries that might be brought about would be divided between the bank and the indemnity company, as provided by this agreement; that in connection of the conspiracy, Hayes, the customer's man of Trasker Leake & Company, reported to his employer the receipt of orders to purchase certain stocks for the account of the bank; that Hill then falsified the book of the bank so that they indicated that a cashier's check of the bank had been issued in the regular course of the business for an alleged customer of the bank; that the purchase of such stocks was indicated to have been made by the bank, and that in case of a sale, the proceeds thereof were going to the bank and

received by Nihill, and when and if profits were made, Nihill received them, and by making false entries, withdrew such funds from the bank and divided the profits with Hayes, but if losses occurred, they were concealed by false entries in the books of the bank. It is alleged that the cashier's checks which were given in payment of all stocks purchased were signed by Nihill, as cashier, or by Sundleiter, assistant cashier of the Bank, or by the President of the bank. It is charged that comparatively few of the stocks purchased in pursuance of such conspiracy, ever came into possession of the Baker State Bank, and that many were sold while the stocks were still in the actual possession of the brokers, and within a short time after the purchase; that the proceeds of such resales were introduced by Nihill as assets of the bank, and that in many instances the brokers sent their checks for these resales to the Baker State Bank, were received by Nihill and by him deposited in the First National Bank of Chicago to the credit of the Baker State Bank without the knowledge of the latter; that many of such stocks were purchased by Nihill through Hayes from Frazier Jelke & Company for Nihill's own account with funds of the Baker State Bank and paid for with cashier's checks drawn against the funds of the bank.

In addition to the above the allegations as to Nihill's purchases of stocks for his personal account are in substance that at diverse times during the period mentioned in the bill, that is to say, from January 3rd, 1928, to June 21st, 1929, Nihill individually, and not purporting or assuming to act as cashier on behalf of the bank, gave to Hayes, as customer's man and agent of Frazier Jelke & Company and thereby to Frazier Jelke & Company, a large number of orders as brokers and agents of and for account of Nihill personally; that upon receipt of these orders from Nihill, Frazier Jelke & Company, as his brokers, purchased large amounts of stock for the account of

as his broker, purchased large amounts of stock for the account of
that upon receipt of these orders from Merrill, Pierce, Fenner & Smullyn,
orders as to the purchase and sale of the stock for account of Merrill, Pierce,
Company and thereby to transfer to the account of Merrill, Pierce, Fenner &
Bank, gave to Wells, the customer's own account of transfer to Wells
and not purchasing or selling to act as a broker on behalf of the
says, from January 1st, 1905, to June 1st, 1905, Merrill, Pierce, Fenner &
diverse times during the period mentioned in the bill, that it is to
purposes of stock for the personal account of the respondent that it
is in addition to the above the allegations as to Merrill,
checks drawn against the funds of the bank.

Nihill; that at the time these orders were given to Frazier Jelke & Company, Nihill had not sufficient means or resources to pay for such stock so ordered and purchased, and that his intention was to embezzle funds for that purpose from the bank in pursuance of such conspiracy, and that the amounts of such stock so purchased are unknown, except in certain instances, and that the date of the purchase of such stocks is unknown, except that it took place prior to September 1st, 1928; that among such stocks purchased for Nihill's individual account are 500 shares of Southern Surety Company, bought for approximately \$16,000.00, and 100 shares of Loft Candy Company stock at a price which is unknown to the complainants. It is alleged that in the purchase of these last mentioned stocks, Frazier Jelke & Company did not purport or assume to act as agents or brokers for the bank, but acted upon the order for such stocks as agents and brokers for Nihill. It is alleged that in addition to all the above purchases, the bank, in good faith, through Frazier Jelke & Company, had purchased certain stocks for its actual customers.

With regard to Lester Carter & Company, the course of procedure is alleged to have been similar to the transactions with Frazier Jelke & Company. It is charged as to them that certain stocks were bought on account of the Baker State Bank for alleged customers of the bank with cashier's checks of that bank, signed by Nihill, as cashier, and delivered to this firm by Hayes for stocks so purchased on account of the bank, and that checks of Lester Carter & Company for the amount of the proceeds of the stocks sold were delivered to the bank and listed by Nihill on the books as part of the bank's assets; that neither Nihill nor anyone acting for the Baker State Bank ever had any contact with Lester Carter & Company, but that orders for the purchase and sale of stocks on account of the bank were given to the firm by Hayes or Frazier Jelke

Ninthly; that at the time these orders were given to transfer the
 Company, Ninth had not sufficient means or resources to pay for
 such stock so ordered and transferred, and that the intention was to
 embargo funds for that purpose from the bank in pursuance of such
 conspiracy, and that the amount of such stock so ordered and
 unknown, except in certain instances, and that the list of the purchase
 of such stocks in unknown, except that it took place prior to
 September 1st, 1933; that one such stock purchased for Ninth's
 individual account are 500 shares of Southern Surety Company, bought
 for approximately \$1,000.00, and 100 shares of Life Candy Company
 stock at a price which is unknown to the conspirators. It is alleged
 that in the purchase of these last mentioned stocks, Traxler Lake
 & Company did not support or agree to not in effect or transfer for
 the bank, but acted upon the order for such stocks as agents and
 brokers for Ninth. It is alleged that in addition to all the above
 purchases, the bank, in good faith, through Traxler Lake & Company,
 had purchased certain stocks for its actual customers.
 With regard to Traxler Lake & Company, the course of
 procedure is alleged to have been similar to the transactions with
 Traxler Lake & Company. It is charged as to them that certain
 stocks were bought on account of the bank from bank for alleged
 customers of the bank with Traxler's checks of that bank, signed by
 Ninth, as cashier, and delivered to this firm of buyers for stocks
 so purchased on account of the bank, and that checks of Traxler
 Garter & Company for the amount of the proceeds of the stocks sold
 were delivered to the bank and listed by Ninth on the books as part
 of the bank's assets; that neither Ninth nor anyone acting for
 the bank had ever had any contact with Traxler Garter &
 Company, but that orders for the purchase and sale of stocks on
 account of the bank were given to the firm of Traxler Lake

& Company, acting through Hayes. It is alleged and stated by counsel for complainants that the fraudulent transactions, and those made in good faith for the bank's customers, are so confused in the book-keeping that it is difficult, except in rare instances, to ascertain from the bank's books just which transactions were bona fide and which were fraudulent. It is charged that the audit indicates that between January 1, 1928, and June 9, 1929, Frazier Jelke & Company received 141 cashier's checks drawn on the Baker State Bank, aggregating \$1,072,170.07, and made over 250 purchases and over 250 separate sales of blocks of stock for the purported account of the Baker State Bank, of which 80% in number and amount were fraudulent and unauthorized by the bank; and that Lester Carter & Company, between March 23, 1928, and February 20, 1929, received a total of 16 cashier's checks drawn on the Baker State Bank, aggregating \$131,163.33; that certain of the stocks purchased from Frazier Jelke & Company were made by Hayes without orders from Nihill as representing the bank, and that after such purchases without such order from Nihill, Nihill then gave cashier's checks drawn, as alleged, on the Baker State Bank in payment for such stocks; that of the entire amount of cashier's checks paid to defendants for all stock purchases, \$732,476.69 in amount were signed by Nihill, \$304,318.94 by Sundleiter, assistant cashier and \$35,374.44 by Charles J. Baker, president of the bank. It is alleged that the bank is organized under the State Banking Law, is located at Cicero, Illinois, and has a capital stock of \$100,000.00. The bill prays for discovery, and that an accounting be had from the respective defendants of the moneys of the bank which are alleged to have been fraudulently withdrawn for the purpose stated, and that defendants be decreed to pay the amounts found to be due. It is insisted by complainants that because of the number and complexity of the transactions involved, they have no adequate remedy at law, and that, therefore, a court of chancery has

jurisdiction; that the brokers were put upon inquiry as to the bona fides of the various transactions, but that they failed to exercise ordinary care and diligence in regard thereto; that Frazier Jelke & Company were charged with notice, as a matter of law that Nihill was without authority to employ the funds of the bank, as alleged; that as to certain purchases made from Frazier Jelke & Company by Nihill for fictitious persons, as charged, such firm cannot retain the bank's funds paid on account of such purchases; that as to certain purchases made by Hayes from Frazier Jelke & Company without orders from Nihill, and for which cashier's checks were subsequently given, such firm must account; that the bank had no power to purchase or speculate in stocks, and that Frazier Jelke & Company were charged with notice as a matter of law that Nihill had no authority to employ the funds of the bank to discharge a personal obligation of Nihill to them. In regard to Lester Carter & Company, it is claimed that while the dealings were similar to those made with Frazier, Jelke & Company, that the orders to this firm were delivered to it by Hayes, and that after the deal was completed, Hayes gave them a cashier's check of the bank. Complainants insist that it is shown as to all defendants that while these stocks were bought, apparently for the bank, still, as a matter of fact, they never came into the actual possession of the bank, and that the volume of such transactions within a period of about a year and six months, and the size of the bank, it being a small suburban institution, should have and did put defendants upon notice that the deals were fraudulent and made with stolen money. None of the deals was made on margin, but each was an actual purchase of stocks.

Such of the defendants as are members of the firm of Frazier Jelke & Company, take the position that Hayes' knowledge of the fraud cannot be imputed to them because Hayes was admittedly

the fraud cannot be imputed to them because they were admittedly
Frazier Lumber Company, take the position that they had knowledge of
such of the defendants as are parties of the writ of

acting in collusion with the bank's agent, Nihill, in his own interest, and not in the interest of defendants; that Nihill's knowledge of the fraud must be imputed to the bank, because Nihill, its cashier, was in full charge of the bank's business; that a broker is not charged with notice that the bank's purchases of stock were for speculation, contrary to the state banking law, merely because it is customary for such bank to purchase for their own customers; that the brokers are holders in due course of the cashier's checks; that Frazier Jelke & Company, and the members of such firm, were not charged with the notice of fraudulent acts from the fact that employees, other than Hayes, may have handled the cashier's checks signed in the name of the bank, and the stocks purchased with such funds, because it is not alleged that any of these other employees at such times had any knowledge that such purchases and sales, other than bona fide transactions, were authorized by the bank; that the bank and its receiver are estopped to recover in this case because the losses were made possible through the acts of its own cashier, to whom it had turned over the sole power of handling its business, and whose records it made no attempt to check, the rule being that as between two innocent parties, the one whose negligence first made the loss possible must suffer. In the case of defendants, members of the firm of Leslie Carter & Company, it is insisted that the cashier's checks, delivered to and cashed by such institution, were delivered during the period between March 23, 1928, and February 2, 1929; that all the stocks purchased from this firm were afterwards resold and the proceeds thereof appropriated by the bank, and that all these facts are shown by the bill of complaint; that a bank may purchase stocks, either for itself or its customers, and that even though the contract for the purchase was ultra vires, neither party can maintain an action to set the transaction aside where the contract has been fully performed.

Complainants contend, and it is our opinion, that

noting in connection with the bank's assets, which, in all our interest, and not in the interest of the bank; that the bank's assets of the bank must be turned to the bank, because the bank, its capital, was in full charge of the bank's business; that a broker is not charged with notice that the bank's business of stock was for speculation, contrary to the stock banking law, merely because it is customary for such bank to purchase for their own customers; that the broker's holder is the owner of the bank's stock; that the bank's stock, and the holders of such stock, were not charged with the notice of the bank's business, and from the fact that employees, other than buyers, may have handled the bank's stock, either in the name of the bank, or the stock purchased with bank funds, because it is not alleged that any of these other employees at such times had any knowledge of such purchases and sales, other than bank time transactions, were authorized by the bank; that the bank and its receiver are authorized to recover in this case because the losses were made possible through the acts of the bank's cashier, to whom it had turned over the sole power of handling its business, and whose receipt it made no attempt to check, the rule being that in between two innocent parties, the one whose negligence first made the loss possible must suffer. In the case of the bank's cashier, members of the bank of Dallas, it is insisted that the cashier's checks, delivered to and cashed by such institution, were delivered during the period between March 15, 1928, and February 1, 1929; that all the stocks purchased from this firm were afterwards resold and the proceeds thereof represented by the bank, and that all these facts are shown by the bill of complaint; that a bank may purchase stocks, either for itself or its customers, and that even though the contract for the purchase was ultra vires, neither party can maintain an action to set the transaction aside where the contract has been fully performed. Complaints against the bank, and it is our opinion, that

equity has jurisdiction of the cause, and inasmuch as defendants by their briefs do not take issue with complainants in this regard, no further comment as to this question is necessary.

It may be assumed that the alleged conspiracy between Nihill and Hayes existed, and that certain of the funds of the bank were withdrawn and used for the purchase of stocks in pursuance of the alleged conspiracy; that these defendants profited by the deals to the extent of their brokerage fees as alleged, and that the deals made were within the scope of Hayes' authority as customer's man, or solicitor. It is not claimed that any of the members of either of the brokerage firms had actual notice of the alleged conspiracy, or of these stock deals made with their respective firms. Two outstanding questions are here presented for determination - First, whether or not upon the statement of alleged facts made in the bill, if taken as true, these defendants were put upon notice of the fact that the bank's funds were being used as alleged, and if so, whether or not they should render an accounting therefor - Second, presuming that the defendants should have put upon notice, can the conduct of Nihill, the cashier of the bank, be imputed to the bank, and were the officers of the bank guilty of such negligence in the premises as will prevent a recovery.

Complainants cite many authorities in support of their contention that the members of these defendant firms should have been and were put upon notice of the fact that the deals made were fraudulent, and that the bank's funds were being illegally used for the purchase of these stocks. A typical case among the multitude of citations is that of Lamson v. Beard, 94 Fed. 30, which, complainants insist, is practically identical with the case at bar, in so far as the facts in the two are concerned. In that case, an action of assumpsit was brought by the receiver of the First National Bank of Pella, Iowa, in the United States Circuit Court for the Northern

equity has jurisdiction of the matter, and in a suit of this kind, no
their right to sue here is a complete bar to this remedy, no
further course as to this question is necessary.

It may be argued that the alleged conspiracy between
Hilli and the bank existed, and that certain of the funds of the bank
were withdrawn and used for the purchase of stocks in violation of
the alleged conspiracy; that these statements provided by the bank
to the extent of their prospective fees as alleged, and that the bank
made were within the scope of their authority as attorneys-in-fact, or
solicitors. It is not claimed that any of the members of either of
the prospective firms had actual notice of the alleged conspiracy, or
of these stock deals made with their respective firms. Two outstand-
ing questions are here presented for determination - first, whether
or not upon the statement of alleged facts made in the bill, it
taken as true, these statements were not upon notice of the fact that
the bank's funds were being used as alleged, and if so, whether or not
they should render an accounting therefor - second, presuming that
the defendants should have had such notice, and the conduct of Hilli,
the conduct of the bank, be imputed to the bank, and were the
officers of the bank guilty of such negligence in the premises as
will prevent a recovery.

Complainants cite many authorities in support of their
contention that the members of these defendant firms should have
been and were not upon notice of the fact that the bank made were
fraudulent, and that the bank's funds were being illegally used for
the purchase of these stocks. A typical case among the multitude of
citations is that of Lawson v. Lord, 94 Fed. 30, which, complainants
insist, is practically identical with the case at bar, in so far as
the facts in the two are concerned. In that case, an action of
assumpsit was brought by the receiver of the first national bank of
Pella, Iowa, in the United States Circuit Court for the Northern

division of the Northern District of Illinois, to recover of certain commission merchants in Chicago the proceeds of drafts of the bank drawn by E. R. Cassatt, its president, in favor of these commission merchants, and delivered to them by Cassatt to discharge his individual liabilities incurred in transactions conducted by them for him on the Board of Trade in Chicago. There were ten of these drafts all drawn upon a printed form, and, except as to dates and amounts, they were as follows:

"First National Bank,

Pella, June 27, 1892.

"Pay to the order of Lamson Bros. & Co. \$400, four hundred dollars.

"E. R. Cassatt, Pt.
Cashier."

"To National Bank of Illinois."

In its opinion, the court states that -

"The word 'Cashier' is in print, and the letters, 'Pt.', opposite the name of Cassatt, were written by him to indicate his office as president of the bank."

In the instant case, the cashier's checks, even those given for the stocks alleged to have been bought for Nihill's individual account, are not shown to have been drawn by Nihill. As already stated, a large proportion of the cashier's checks drawn in favor of these brokerage houses, and payable out of the funds of the bank, were drawn by the assistant cashier, and many of them by the president of the bank, and there is no suggestion that these last mentioned officers were in any way involved in the alleged conspiracy. In the Lamson case, all the drafts were drawn by the president to pay a debt owed by him, and were charged against him in the bank. The case at bar is also distinguished from the Lamson case for the reason that many of the checks drawn by these officers of the bank were for bona fide purchases for actual customers of the bank, and most all the purchases were on account of the bank. Hayes, the customer's man, employed by Frazier Jelke & Company, brought certain orders for purchases of stocks to defendants, some of which were legitimate, and some of which

division of the National Bank of Illinois, in removal of certain
 communication made in this case the proceeds of sales of the bank
 drawn by E. A. Bennett, the president, in favor of these individuals
 merchants, and delivered to them by check to dispose of his individual
 and financial interest in the corporation, conducted by them for him
 on the 10th of March in Chicago. There were ten of these checks
 all drawn upon a printed form, and except as to dates and amounts,
 they were as follows:

First National Bank,
 Peoria, June 27, 1932.

"Pay to the order of Eamon Bros. \$50,000.00, four hundred
 dollars."

"E. A. Bennett, Jr.
 Cashier."

"The National Bank of Illinois."

In its opinion, the court states that -

"The word 'cashier' is in print, and the letters 'E. A.'
 precede the name of Bennett, were written by him to
 indicate his office as president of the bank."

In the instant case, the cashier's checks, even those given for the
 stocks alleged to have been bought for Bennett's individual account,
 are not shown to have been drawn by Bennett. As already stated, a
 large proportion of the cashier's checks drawn in favor of these
 brokerage houses, and payable out of the funds of the bank, were drawn
 by the assistant cashier, and many of them by the president of the
 bank, and there is no suggestion that these last mentioned officers
 were in any way involved in the alleged conspiracy. In the instant case,
 all the checks were drawn by the president to pay a debt owed by him,
 and were charged against him in the bank. The case at bar is also
 distinguished from the instant case for the reason that many of the
 checks drawn by these officers of the bank were for bona fide purposes
 for actual business of the bank, and most all the checks were on
 account of the bank. Hence, the defendant's man, employed by broker
 J. L. & Company, brought certain orders for purchases of stocks to

were made in pursuance of the conspiracy with Nihill to swindle the bank. From the circumstances here, is it to be presumed that these defendants were put upon notice of the fact that a large portion of these deals were fraudulent, and that they should have distinguished the good from the bad? We are of the opinion that we cannot indulge in such a presumption.

In United States Gold Storage Co. v. The Central Manufacturing District Bank, 343 Ill. 503, the gold storage company brought suit against the bank to recover the amount of a number of checks drawn on the bank and signed by some officer of this company, who was authorized to sign checks upon the presentation to such officer of a voucher approved by plaintiff's chief clerk. The checks were all made payable to certain customers of plaintiff company to whom plaintiff was not indebted. The checks were cashed by the bank upon the forged endorsements of the various customers' names on the checks made by the chief clerk who drew the vouchers, who had full authority to make such vouchers in bona fide transactions, and the question presented to the Supreme Court in that case was whether the action of the chief clerk could be imputed to plaintiff company, and whether plaintiff had constructive notice of the fact that the endorsements on the checks were forged, and on this question the Supreme Court said:

"Neither is the plaintiff to be charged with any notice of Meister's intention not to deliver the checks to the payees, nor with his knowledge that he had not done so but had forged the indorsements and disposed of the checks. *** The general rule that notice to an agent, while acting for his principal, of facts affecting the character of the transaction is constructive notice to the principal, is subject to an exception when the agent is engaged in committing an independent fraudulent act on his own account and the facts to be imputed relate to this fraudulent act. Allen v. South Boston Railroad Co., 150 Mass. 200; Henry v. Allen, 151 N. Y. L.; Benedict v. Arnoux, 154 N. Y. 715; Terrell v. Branch Bank of Mobile, 12 Ala. 502; American Surety Co. v. Pauly, 170 U. S. 133."

were made in pursuance of the conspiracy with intent to defraud the bank. From the circumstances here, it is to be presumed that these defendants were put upon notice of the fact that a large portion of these checks were fraudulent, and that they should have distinguished the good from the bad. As a part of the opinion that we cannot include in such a presentation.

In United States v. The Central Bank

120 U.S. 338, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

brought suit against the bank to recover the amount of a number of checks drawn on the bank and signed by some officer of this company, who was authorized to sign checks upon the presentation of such officer of a vendor approved by plaintiff's chief clerk. The checks were all made payable to certain customers of plaintiff company to whom plaintiff was not indebted. The checks were cashed by the bank upon the forged endorsements of the various customers' names on the checks made by the chief clerk and given the vouchers, who had full authority to make such vouchers in such kind transactions, and the question presented to the Supreme Court in that case was whether the action of the chief clerk could be imputed to plaintiff company, and whether plaintiff had constructive notice of the fact that the endorsements on the checks were forged, and on this question the Supreme Court said:

"Whether is the plaintiff to be charged with any notice of defendant's intention not to deliver the checks to the bank, nor with his knowledge that he had not done so but had forged the endorsements and delivered of the checks? The general rule that notice to an agent, while acting for his principal, of facts affecting the character of the transaction is constructive notice to the principal, is subject to an exception when the agent is engaged in committing an independent fraudulent act on his own account and the facts to be imputed relate to this fraudulent act. Allen v. Wright, 100 U.S. 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

Under the facts as presented here, it cannot be said that Hayes' action in the premises can be imputed to the defendants, or that defendants were required to ascertain which of the cashier's checks given to them represented a bona fide transaction, and which a fraudulent one.

A further, question for consideration is whether or not the negligence of the officers of the bank, estops the bank from placing its loss on defendants. Nihill, the cashier, seems to have had the direction and management of the bank's affairs. He must have made use of the assistant cashier, and possibly the president, in the execution of these cashier's checks to be delivered to defendants in pursuance of the alleged conspiracy. We say this with the fact before us that a large proportion of these checks were signed by these officers.

In Hansel v. First National Bank of Mansfield, 158 Ill. App. 127, the cashier of the plaintiff bank purported to represent the bank as agent for plaintiff in making investments of plaintiff's funds, and all the transactions in that case were conducted by the cashier. The cashier claimed to have invested certain of plaintiff's funds in various securities, which turned out to be non-existent or forged. The plaintiff brought suit against the bank for various amounts which he claimed had been given to the bank to be invested for him. Judgment was obtained against the bank in the lower court, and in affirming this judgment, the Appellate Court said:

"The transactions here involved were within the ordinary scope of the business of the defendant bank and the entry of such transactions upon its books constituted notice to it of the extent and character of such transactions, if any such notice was necessary, in view of the fact that Langley was the cashier and general manager of the bank. The fact that some of the entries in plaintiff's account with the defendant bank were false and fictitious

Under the terms of the contract, it is to be said that 'yes' which in the contract can be located to the defendant, or that defendant was required to accept in which of the contract's checks given to them, being the transaction, and which a fraudulent one.

Further, question for consideration is whether or not the defendant, in the absence of the bank, entered the bank from placing its loss on defendant. If, the answer, seems to have had the direction and consent of the bank's officers. He must have made use of the defendant's cashier, and possibly the president, in the execution of these cashier's orders to be delivered to defendant in pursuance of the alleged conspiracy. He was this with the rest before us that a large number of these checks were signed by these officers.

In *Bank v. First National Bank of Newfield*, 133 Ill.

App. 127, the cashier of the defendant bank reported to represent the bank as cashier in making investments of plaintiff's funds, and all the transactions in that case were conducted by the cashier. The cashier claimed to have invested certain of plaintiff's funds in various securities, which turned out to be non-existent or forged. The plaintiff brought suit against the bank for the various amounts which he claimed had been given to the bank to be invested for him. Judgment was obtained against the bank in the lower court, and in affirming this judgment, the appellate court said:

"The transactions here involved were within the ordinary scope of the business of the defendant bank and the only of such transactions upon the bank's contract was not to it of the extent and character of such transactions. If any such notice was necessary, it was of the fact that the cashier was the cashier and general manager of the bank. The bank is not to be held liable for the actions of its cashier in the absence of some evidence of fraud and collusion on the part of the bank itself."

and contained items relating to forged paper cannot relieve the defendant bank from liability, because it is bound by the acts of its cashier in that respect. In *Ryan v. Dunlap*, 17 Ill. 40, it was said: 'The cashier is necessarily the general agent of the bank in dealing with customers in money, notes and bills - the receipt, deposit, transfer and payment of them. It is indispensable to the interests of the corporation, and necessary to the protection and security of the customers that he should exercise these powers, and that his acts should bind his employers.'

We are of the opinion that under the authorities, upon the facts set forth in the amended and supplemental bill, the court was justified in sustaining the demurrer thereto. The decree is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

and admitted there was no doubt as to the fact that it
 relieve the bank from its liability, because it
 is done by the acts of the cashier in that respect.
 In *Yan v. Bank*, 12 Ill. 47, it was said: "The cashier
 is necessarily the general agent of the bank in dealing
 with contracts in money, notes and bills - the receipt,
 deposit, transfer and payment of them. It is indispensable
 to the interests of the corporation, and necessary to
 the protection and security of the creditors that he
 should exercise these powers, and that his acts should
 bind the corporation."

It is of the opinion that under the authorities, upon
 the facts set forth in the proposed supplemental bill, the court
 was justified in granting the summary remedy. The answer is
 affirmed.

WILLIAM.

REBEK, J. J. and SIMON, J. CONCUR.

37129

SOMMER & MACA GLASS MACHINERY CORPORATION,
a Corporation, Kurt Sommer and Paul Maca,

(Plaintiffs) Appellants,

v.

JAY M. JOHNSON and JOHNSON FARE BOX COMPANY,
a Corporation, impleaded with JAY M. JOHNSON,

(Defendants) Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

Opinion filed Oct. 28, 1934

2784 L.A. 620

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County, vacating and setting aside a judgment previously entered in favor of plaintiffs and against defendants.

The suit is in assumpsit. Demurrers were filed to the declaration, overruled and defendants were given until January 23, 1933, to plead. On that day defendants filed a plea of non-assumpsit with an affidavit of merits.

On May 11th, 1933, notice was served on Nelson, Burton & Quindry, attorneys of record for defendants, that on May 12th, 1933, plaintiffs would move the court to strike the affidavit of merits from the files. On May 12th, 1933, the court continued this motion until June 9th, 1933.

On June 7th, 1933, after notice had been served on counsel for plaintiffs and upon defendants, ^{the} attorneys for defendants, Nelson, Burton & Quindry, moved the court for leave to withdraw as such attorneys, which motion was on that date allowed. Thereafter, on June 9th, 1933, the date to which the motion to strike defendant's affidavit of merits had been continued, on motion of plaintiff's by their attorneys and without further notice to defendants, the court entered an order striking defendant's affidavit of merits from the files, caused the case to be called for trial, and after hearing evidence, found the issues for the plaintiff, assessed plaintiff's damages at the sum of \$7,000.00, and entered judgment for that amount.

SHAW & SONS, INCORPORATED,
a corporation, Trustee and Real Estate

(Plaintiffs) Appellants,

v.

JAY M. BURTON and JOSEPH E. BURTON, JR.,
a corporation, Impleaded with JAY M. BURTON,

(Defendants) Appellees.

Opinion filed Oct. 23, 1934

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County, vacating and setting aside a judgment previously entered in favor of plaintiffs and against defendants.

The suit is in assumpsit. Complaints were filed to the declaration, overruled and defendants were given until January 23, 1933, to plead. On that day defendants filed a plea of non-assumpsit with an affidavit of merits.

On July 13th, 1932, notice was served on Nelson, Burton & Quindry, attorneys of record for defendants, that on July 13th, 1932, plaintiffs would move the court to strike the affidavit of merits from the files. On May 13th, 1933, the court continued this motion until June 9th, 1933.

On June 9th, 1933, after notice had been served on counsel for plaintiffs and non-defendants ^{the} attorneys for defendants, Nelson, Burton & Quindry, moved the court for leave to withdraw as such attorneys, which motion was on that date allowed. Thereafter, on June 9th, 1933, the date to which the motion to strike defendant's affidavit of merits had been continued, on motion of plaintiff, by their attorneys and without further notice to defendants, the court entered an order striking defendant's affidavit of merits from the files, caused the case to be called for trial, and after hearing evidence, found the issues for the plaintiff, assessed plaintiff's damages at the sum of \$7,000.00, and entered judgment for that

CIRCUIT COURT

COOK COUNTY.

27874.620

On July 5th, 1933, an appearance was filed by the defendants by James M. Murray and Percy R. Jacobson, as their attorneys, together with a motion supported by affidavits to set aside the judgment entered June 9th, 1933. To this motion defendants on August 7th, 1933, filed objections, and on the same day the court entered an order giving defendants leave to file instanter a motion in the nature of a writ of error coram nobis, which was done, and after a hearing on this motion and the objections thereto, the court after a hearing on the motion and affidavit, on August 14th, 1933, entered the following recitation, finding and order:

"This cause coming on for hearing on motion in the nature of a writ of error coram nobis of defendant, Johnson Fare Box Company, by Percy Jacobson and James M. Murray, its attorneys, and the motion in nature of writ of error coram nobis of defendant, Jay M. Johnson, by Percy Jacobson and James M. Murray, his attorneys, to vacate and set aside judgment heretofore entered in cause on June 9, 1933; and on affidavit of R. Hosken Damon, agent of Johnson Fare Box Company, in support of said motion of said Johnson Fare Box Company; and on affidavit of Jay M. Johnson in support of said motion of Jay M. Johnson; and on affidavit of Kellam Foster, an attorney for plaintiffs in opposition thereto; and on motion of plaintiffs, by Marshall Solberg and Kellam Foster, their attorneys, to dismiss said motions in the nature of writs of error coram nobis of defendants, and each of said motions; and on affidavit of Kellam Foster heretofore filed in cause on August 7, 1933, in support of said motion; and the Court having read said affidavits; and Attorney B. Blakeney Harris of the firm of Nelson & Quindry appearing in open court for defendants, and the Court having heard his arguments, and arguments of other counsel:

It Is Ordered that said motion of plaintiffs to dismiss said motions in nature of writs of error coram nobis of defendants be, and same is, hereby denied, to which plaintiffs duly except.

It Is Further Ordered that motions in nature of writs of error coram nobis of the defendants, heretofore filed on August 7, 1933, to vacate and set aside judgment heretofore entered in cause be, and same and each of same are hereby allowed, to which plaintiffs duly except.

It Is Further Ordered that judgment heretofore entered in cause be, and same is hereby vacated and set aside, to which plaintiffs except; from which said order plaintiffs pray an appeal to Appellate Court in and for the First District of the State of Illinois, which said appeal is hereby allowed upon plaintiffs filing bond within thirty days from date in the sum of \$100, with surety to be approved by the clerk of this court; and plaintiffs allowed sixty days from date in which to file bill of exceptions in said cause."

On July 26th, 1933, an appeal was filed by the defendants, James M. Murray and Terry M. Jacobson, as their attorneys, together with a motion supported by affidavits to set aside the judgment entered June 28th, 1933. To this motion defendants on August 7th, 1933, filed objections, and on the same day the court entered an order giving defendants leave to file instant a motion in the nature of a writ of error coram nobis, which was done, and after a hearing on this motion and the objections thereto, the court after a hearing on the motion and affidavits, on August 14th, 1933, entered the following resolution, finding and order:

"This case coming on for hearing on motion in the nature of a writ of error coram nobis of defendant, Johnson, here for Company, by Terry Jacobson and James M. Murray, its attorneys, and the motion in nature of writ of error coram nobis of defendant, Jay M. Johnson, by Terry Jacobson and James M. Murray, his attorneys, to vacate and set aside judgment heretofore entered in cause on June 8, 1933; and on affidavit of Jay M. Johnson, agent of Johnson here Box Company, in support of said motion of said Johnson here Box Company; and on affidavit of Jay M. Johnson in support of said motion of Jay M. Johnson; and on affidavit of William Foster, an attorney for plaintiffs in opposition thereto; and on motion of plaintiffs, by Marshall Solberg and William Foster, their attorneys, to dismiss said motions in the nature of writs of error coram nobis of defendant, and each of said motions; and on affidavit of William Foster heretofore filed in cause on August 7, 1933, in support of said motions; and the court having read said affidavits and attorney's briefs of the firm of Nelson & Winans appearing in open court for defendant, and the court having heard his arguments, and arguments of other counsel:

It is ordered that said motion of plaintiffs to dismiss said motions in nature of writs of error coram nobis of defendant be, and same is, hereby denied, to which plaintiffs duly except.

It is further ordered that motions in nature of writs of error coram nobis of the defendants, heretofore filed on August 7, 1933, to vacate and set aside judgment heretofore entered in cause be, and same and each of same are hereby allowed, to which plaintiffs duly except.

It is further ordered that judgment heretofore entered in cause be, and same is hereby vacated and set aside, to which plaintiffs except; from which said order plaintiffs pray in appeal to the State Court in and for the First District of the State of Illinois, which said appeal is hereby allowed upon plaintiffs' bill of exceptions filed from date in the sum of \$100, with array to be approved by the clerk of this court; and plaintiffs filed sixty days from date in which to file bill of exceptions in said cause."

Rule 16 of the Circuit and Superior Courts of Cook County provides, (Section 1):

"No motion will be heard or order made in any cause without notice to the opposite party after such party has entered his appearance, so long as he is not in default for want of an answer, except when a cause is reached on the trial call and called for trial. A defendant who has appeared, even though in default for want of an answer, shall be entitled to notice, unless after notice to him his default has been entered of record. But the Court may by order direct that notice of any or all proceedings be given to any defendant so defaulted of record."

The record indicates that the motion to strike defendants' affidavit of merits, and that alone was set by the court for June 9th, 1933. In the interim, between this setting and that date, defendants counsel withdrew from the case. There is nothing in the record to indicate that the cause was reached on a trial call on June 9th, 1933, or that defendant had any reason to believe that the cause was to be heard on that day. Even though the court might have been justified in striking defendants' affidavit of merits, the record shows that a plea of defendants to the declaration still remained on file and our conclusion is that under the rule just quoted the court was not justified in hearing the case ex parte at that time and in entering judgment for plaintiff. There is nothing in the record to indicate that defendant had notice that when the motion to strike the affidavit of merits was heard on June 9th, 1933, the court would do more than to pass upon that motion.

In Risedorf v. Fyfe, 250 Ill. App. 122, this court said:

"In Straus v. Biesen, 242 Ill. App. 370, the court held that it was error to assess damages without notice to defendant whose appearance was on file, and for that reason reversed the judgment.

Proceedings under section 89 of the Practice Act, Cahill's St. ch. 110, Par. 89, required the court to pass on the question as to whether there was an error in fact in the record before it. We will presume that if the court had known that the defendant had his appearance upon file, and that no notice had been given him of the application for default and judgment, the court would not have proceeded to assess the damages in the case. The absence of notice was a question of fact which was not brought to the attention of the court, and did not involve a question of law. The question of law must be based upon the fact, and the

This is of the Circuit and District Courts of Cook County

provided, (Section 1):

"No motion will be heard on or after the day of the trial without notice to the opposite party after such party has entered his appearance, so long as he is not in default for want of an answer, except when a court is recessed on the trial day and called for trial. A defendant who has entered his appearance in his own behalf for want of an answer, shall be entitled to notice, unless after notice to him his default is entered of record, but the court may by order direct that notice or any or all proceedings be given in any defendant as defendant of record."

The record indicates that the motion to strike defendant's affidavit of service, as that filed was set by the court for June 27th, 1938. In the interim, between this setting and the date, defendant's counsel withdrew from the case. There is nothing in the record to indicate that the case was removed on a trial call on June 27th, 1937, or that defendant had any reason to believe that the case was to be heard on that day. Even though the court might have been justified in striking defendant's affidavit of service, the record shows that a plea of default in the declaration still remained on file and our conclusion is that under the rule just quoted the court was not justified in leaving the case as being at that time and in entering judgment for plaintiff. There is nothing in the record to indicate that defendant had notice that when the motion to strike the affidavit of service was heard on June 27th, 1937, the court would do more than to pass upon that motion.

In Blanchard v. V.P., 180 Ill. App. 127, this court said:

"In Blanchard v. V.P., 180 Ill. App. 127, the court held that it was error to remove defendant without notice to defendant and that the court was on file, and for that reason reversed the judgment. The court said: 'Proceeding under section 84 of the Practice Act, defendant's motion was filed with the court to pass on the question of default there was an error in fact in the record before it. It is apparent that if the court had known that the defendant had his appearance upon file, and that no notice had been given him of the application for default and judgment, the court would not have proceeded to pass the motion in the case. The purpose of notice is a question of fact which was not in dispute to the satisfaction of the court, and did not involve a question of law. The question of law must be based upon the facts, and the

law was that without notice to the defendant, whose appearance was on file, there could be no valid judgment. That no notice was given, and that defendant's appearance was on file, were matters of fact which were unknown to the court."

The order of the Circuit Court is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

law was that without notice to the defendant, whose appearance was on time, there could be no valid judgment. That no notice was given, and that defendant's appearance was on time, were matters of fact which were unknown to the court."

The order of the Illinois Court is affirmed.

WITNESSES.

HERBERT F. L. AND ELLIOTT J. C. COUNCIL

37129

SOMMER & MACA GLASS MACHINERY
CORPORATION, a Corporation, KURT
SOMMER and PAUL MACA,

(Plaintiffs) Appellants,

v.

JAY M. JOHNSON and JOHNSON FARE BOX
COMPANY, a corporation, impleaded
with JAY M. JOHNSON,

(Defendants) Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

278 I.A. 620⁵
Opinion filed Dec. 19, 1934

On Petition for Rehearing.

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

The only point made by plaintiffs in their petition for rehearing is that this court erred in its conclusion that nothing was before the trial court on June 9th, 1933, other than the motion to strike the affidavit of merits from the files. In the petition for rehearing, we are referred to the record which shows that the notice of the motion served on defendants indicates that plaintiffs would "move to strike from the files defendants' affidavit of merits in the above entitled cause and for judgment for plaintiffs."

Plaintiffs' statement of the case recites that "on May 12th, 1933, plaintiffs, after having given due notice moved to strike this affidavit of merits," - referring to the affidavit of merits filed by defendant. Further it is there recited that "The Court, thereupon, continued the matter to June 9th, 1933," (meaning the motion to strike the affidavit of merits). We are also there referred to page 14 of the abstract filed in the case. On page 14 of this abstract we find the following: "May 12th, 1933, plaintiff moved to strike this defendant's affidavit of merits; hearing on this motion was continued to June 9th, 1933."

JOHN A. JOHNSON, JR., Plaintiff,
vs.
JOHN A. JOHNSON, Defendant.

(Petitioner's Exhibit)

JAY E. JOHNSON and JOHNSON & SONS,
JOHNSON & SONS, Inc., Incor-
porated, with JAY E. JOHNSON,
Defendants.

(Defendant's Exhibit)

In Petition for Rehearing.

THE JUSTICE HAS DELIVERED THE DECISION ON THE PETITION.

THE ONLY POINT MADE BY PLAINTIFF IN HIS PETITION

FOR REHEARING IS THAT THIS COURT ERRED IN ITS CONCLUSION THAT NOTHING

WAS BEFORE THE COURT WHEN ON JUNE 9TH, 1934, OTHER THAN THE MOTION

TO STRIKE THE AFFIDAVIT OF MERITS FROM THE FILE. IN THE PETITION

FOR REHEARING, HE HAS REFERRED TO THE RECORD WHICH SHOWS THAT THE

NOTICE OF THE MOTION WRITING IN DEFENDANT'S PETITION THAT PLAINTIFF'S

WOULD "MOVE TO STRIKE FROM THE FILE DEFENDANT'S AFFIDAVIT OF MERITS

IN THE ABOVE CAPTIONED SUIT AND FOR JUDGMENT FOR PLAINTIFF."

PLAINTIFF'S STATEMENT OF THE CASE REVEALS THAT "ON

MAY 14TH, 1934, PLAINTIFF, AFTER HAVING GIVEN HIS WRITING MOVED TO

STRIKE THIS AFFIDAVIT OF MERITS," - REFERRING TO THE AFFIDAVIT OF

MERITS FILED IN DEFENDANT. FURTHER IT IS THERE RECORDED THAT "THE

COURT, THEREAFTER, CONTINUED THE MATTER TO JUNE 9TH, 1934," (COUNTY

THE MOTION TO STRIKE THE AFFIDAVIT OF MERITS). HE HAS ALSO THERE

REFERRED TO PAGE 14 OF THE REPORT FILED IN THE CASE. ON PAGE 14

OF THIS REPORT HE HAS THE FOLLOWING: "MAY 14TH, 1934, PLAINTIFF

MOVED TO STRIKE THIS DEFENDANT'S AFFIDAVIT OF MERITS; HEARING ON

THIS MOTION WAS CONTINUED TO JUNE 9TH, 1934."

Opinion filed Dec. 13, 1934
2781.A.820

As we said in our original opinion, the record clearly indicates that on June 9th, 1933, the day the judgment was entered, nothing was before the court other than the motion to strike the affidavit of merits, and there is nothing presented by the petition for rehearing to convince us that this is not true and that we should not adhere to our original opinion. The judgment is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

It is said in our original motion, the record clearly indicates that on June 10, 1931, the day the judgment was entered, nothing was before the court other than the motion to set aside the affidavit of service, and there is nothing to suggest that the motion for reopening the evidence as that this is not true and that we should not adhere to our original motion. The judgment is affirmed.

W. H. HARRIS, JR.

W. H. HARRIS, JR., JUDGE.

37174

ANNA KRAUSS,

Defendant in Error,

v.

NORTHMORE GARAGE AND SAFETY BRAKE
SERVICE CO., a Corporation,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

278 I.A. 621¹

Opinion filed Dec. 19, 1934

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to reverse a judgment of the Municipal Court against it for rent alleged to be due from it to plaintiff. The cause was submitted to a jury, but the court directed a verdict for plaintiff. There is no appearance here for plaintiff.

On April 11th, 1928, Abe Kriloff, as lessor, made a lease to John Gonsch and George William Freund, lessees, of the premises known and described as 6116 and 6118 North Western Avenue in the city of Chicago for a term beginning April 11th, 1928, and ending December 31st, 1935, for a rental of \$350.00 a month for the first year, \$400.00 for the second year and \$500.00 a month for the remainder of the term. At the time the lease was executed, the lessee deposited with the lessor the sum of \$2,500.00 as security for the performance of the terms of the lease, and the lessor, as a part of the leasing agreement, agreed to pay the lessee interest on the \$2,500.00 at the rate of 6% per annum, payable semi-annually on the first days of December and June of each year, and that in the event the lessees should have performed all the terms and conditions of the lease, this deposit of \$2,500.00 should be applied to the payment of the rent accruing during the last five months of the term, and that no interest should be paid to the lessees for the period for which it provided that the deposit should be applied as rental. On February 11th, 1930, Freund and Gonsch assigned all their interest

ALMA KRAUSE,

Defendant in Error,

v.

NORTHERN TRUST AND SAVINGS BANK
SERVICE CO., a Corporation,

Plaintiff in Error.

NOTICE TO DEPOSITORS

OF CHICAGO.

2781 A. 621

Opinion filed Dec. 13, 1934

NO. 30 THE FIRST JUDGE DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to reverse a judgment of the appellate court against it for rent alleged to be due from it to plaintiff. The case was submitted to a jury, but the court directed a verdict for plaintiff. There is no appearance here for plaintiff.

On April 11th, 1933, the Krieffs, as lessor, made a lease to John Gonsch and George William Freund, lessees, of the premises known and described as 616 and 618 North Western Avenue in the city of Chicago for a term beginning April 11th, 1933, and ending December 31st, 1935, for a rental of \$250.00 a month for the first year, \$400.00 for the second year and \$500.00 a month for the remainder of the term. At the time the lease was executed, the lessee deposited with the lessor the sum of \$2,500.00 as security for the performance of the terms of the lease, and the lessor, as a part of the leasing agreement, agreed to pay the lessee interest on the \$2,500.00 at the rate of 6% per annum, payable semi-annually on the first days of December and June of each year, and that in the event the lessees should have performed all the terms and conditions of the lease, this deposit of \$2,500.00 should be applied to the payment of the rent accruing during the last five months of the term, and that no interest should be paid to the lessees for the period for which it provided that the deposit should be applied as rental. On February 11th, 1930, Freund and Gonsch assigned all their interest

in the lease to the defendant, including their interest in the \$2,500.00 deposited with the lessor. On June 2nd, 1930, Krilloff, the lessor, assigned all his interest in the lease to the plaintiff. The suit is for rent alleged to be due plaintiff for the months of January, February, March and April, 1931, at \$450.00 per month, a total of \$1,800.00, the amount of the judgment from which this appeal is prosecuted.

Defendant filed an affidavit of merits denying the claim of indebtedness, also a set-off, in which it is claimed generally that the plaintiff is indebted to defendant in the sum of \$2,500.00, with interest from July 1st, 1930, at the rate of 6% per annum; also that on the 26th day of February, 1931, plaintiff recovered a judgment against defendant in a forcible entry and detainer suit brought by plaintiff against defendant for the recovery and possession of the property involved, and that thereafter, and after a writ of restitution had been served upon defendant, it vacated the premises and ceased the use and occupation thereof on March 27th, 1931, at which time plaintiff took possession, and that because of the termination of the lease, defendant is entitled to the repayment of a portion of the \$2,500.00 deposited, together with interest from July 1st, 1930, less the rent due the plaintiff prior to the termination of the lease. Under this claim of set-off, defendant's particular claim seems to be that under the terms of the agreement running with the deposit of the \$2,500.00, plaintiff is indebted to it in the sum of \$1,308.05, with interest from March 27th, 1931, the date defendant was ousted from the premises. In its brief filed here, defendant states that at the time it was ousted, it was indebted to plaintiff in the sum of \$1,305.00 for rent, which amount should be deducted from the \$2,500.00 deposit, together with interest thereon, as stated, and that the balance should be paid to defendant. There is no question but that plaintiff terminated the lease on March 27th,

in the lease to the defendant, including said interest in the
\$2,500.00 deposited with the lessor. On June 1st, 1930, Killeb,
the lessor, assigned all his interest in the lease to the plaintiff.
The suit in this case is alleged to be due plaintiff for the months of
January, February, March and April, 1931, at \$400.00 per month, a
total of \$1,600.00, the amount of the judgment from which this appeal
is prosecuted.

Defendant filed an affidavit of service denying the
claim of indebtedness, also a set-off, in which it is claimed gen-
erally that the plaintiff is indebted to defendant in the sum of
\$2,500.00, with interest from July 1st, 1930, at the rate of 6% per
annum; also that on the 23rd day of February, 1931, plaintiff
recovered a judgment against defendant in a forcible entry and
detainer suit brought by plaintiff against defendant for the recovery
and possession of the property involved, and that thereafter, and
after a writ of restitution had been served upon defendant, it vacated
the premises and ceased the use and occupation thereof on March 27th,
1931, at which time plaintiff took possession, and that because of
the termination of the lease, defendant is entitled to the repayment
of a portion of the \$2,500.00 deposited, together with interest
from July 1st, 1930, less the rent due the plaintiff prior to the
termination of the lease. Under this claim of set-off, defendant's
particular claim seems to be that under the terms of the agreement
running with the deposit of the \$2,500.00, plaintiff is indebted to it
in the sum of \$1,600.00, with interest from March 27th, 1931, the date
defendant was ousted from the premises. In its brief filed her-
e, defendant states that at the time it was ousted, it was indebted to
plaintiff in the sum of \$1,300.00 for rent, which amount should be
deducted from the \$2,500.00 deposit, together with interest thereon,
as stated, and that the balance should be paid to defendant. There
is no question but that plaintiff terminated the lease on March 27th,

1931, when it ousted defendant under the judgment and writ obtained in the forcible detainer proceeding. However, the lease between the parties contains the following provision:

"The obligation of Lessee to pay the rent reserved hereby during the balance of the term hereof, or during any extension hereof, shall not be deemed to be waived, released or terminated nor shall the right and power to confess judgment given in clause fifteenth hereof be deemed to be waived or terminated, by the service of any five-day notice, other notice to collect, demand for possession, or notice that the tenancy hereby created will be terminated on the date therein named, the institution of any action of forcible detainer or ejectment or any judgment for possession that may be rendered in such action, or any other act or acts resulting in the termination of Lessee's right to possession of the demised premises. The Lessor may collect and receive any rent due from Lessee, and payment of receipt thereof shall not waive or affect any such notice, demand, suit or judgment, or in any manner whatsoever waive, affect, change, modify or alter any rights or remedies which Lessor may have by virtue hereof."

In Central Investment Co. v. Melick, 267 Ill.564, cited by defendant, the Supreme Court said:

"The case of Grommes v. St. Paul Trust Co., 147 Ill. 634, is decisive of the second point raised. There was involved in that case a lease with practically the same provisions as those contained in the third clause of the lease here in question, and it was there said: 'There is nothing illegal or improper in an agreement that the obligation of the tenant to pay all the rent to the end of the term shall remain notwithstanding there has been a re-entry for default, and if the parties choose to make such an agreement we see no reason why it should not be held to be valid as against both the tenant and his sureties. *** It may not be strictly accurate or correct to call the money to be paid after re-entry rent, or to treat the lease as in force after a re-entry. But the parties have a right to fix the amount of the rent to accrue according to the terms of the lease as the amount of damages to be paid by the tenant in case of a breach of his covenants. It can make but little practical difference whether the sum agreed to be paid be called rent or damages. It may be regarded as damages for the purposes of this suit. Hall v. Gould, 13 N.Y. 127; Underhill v. Collins, 132 id. 269.' Whether, as the plaintiff in error contends, by bringing its action of forcible detainer under our statute the defendant in error elected to determine the lease is unimportant under the holding in that case, as the amounts accruing after the re-entry are more properly regarded as the damages agreed upon between the parties in case of a breach of the covenants of the lease."

We are of the opinion that under the terms of the lease, plaintiff is entitled to recover the amounts claimed, and that defendant is not entitled to recover anything under its set-off. The judgment is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

1961, then it stated defendant under the judgment and it obtained in the forcible detainer proceeding. However, the lease between the

parties contains the following provision:

"The lessor agrees to pay the rent reserved hereby during the term of the lease, or during any extension thereof, shall not be deemed to be waived or terminated until the right to possession has been given in whole or in part to the lessor or his assigns, or terminated by the expiration of any five-day notice, or notice to collect, demand for possession, or notice that the tenancy hereby created will be terminated on the date therein named, the institution of any action of forcible detainer or ejectment or any judgment for possession that may be rendered in such action, or any other act or acts relating in the termination of lessor's right to possession of the premises. The lessor may collect and receive any rent due from lessee, and payment of receipt thereof shall not waive or affect any such notice, demand, suit or judgment, or in any manner whatsoever waive, affect, waive, modify or alter any rights or remedies which lessor may have by virtue hereof."

In General Investment Co. v. Weitz, 265 Ill. 504, cited

by defendant, the Supreme Court said:

"The case of General v. Weitz, 265 Ill. 504, is decisive of the second point raised. There was involved in that case a lease with provision for the same provisions as those contained in the third clause of the lease here in question, and it was there said: 'There is nothing illegal or improper in an agreement that the obligation of the tenant to pay all the rent to the end of the term shall remain notwithstanding the fact that there has been a re-entry for default, and in the parties chosen to make such an agreement we see no reason why it should not be held to be valid as against both the tenant and his sureties.' It may not be strictly accurate or correct to call the money to be paid after re-entry rent, or to treat the lease as a lease after a re-entry. But the parties have a right to fix the amount of the rent to become according to the terms of the lease as the amount of damages to be paid by the tenant in case of a breach of his covenants. It can make but little practical difference whether the amount agreed to be paid is called rent or damages. It may be regarded as damages for the purpose of this suit. Will v. Doherty, 12 N.Y. 167, 168; Wheeler v. Wheeler, 128 Ill. 282." Whether, as the plaintiff in error contends, by bringing its action of forcible detainer under an statute the defendant in error elected to determine the lease is unimportant under the holding in that case, as the amount according after the re-entry was more properly regarded as the damages agreed upon between the parties in case of a breach of the covenants of the lease."

It was the opinion that under the terms of the lease,

plaintiff is entitled to recover the amount claimed, and that defendant is not entitled to recover anything under its set-off. The judgment

is affirmed.

APPROVED

37198

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

ANTHONY BUZINKIS and JOHN DEMESKE,

Plaintiffs in Error.

WRIT OF ERROR TO

CRIMINAL COURT

COOK COUNTY.

278 I.A. 621²

Opinion filed Dec. 19, 1934

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

The defendants here were tried by the court, after waiver by them of a jury trial, found guilty of the crime of petit larceny, and the property taken was found to be of the value of \$14.50. Judgment was entered on the finding, and they were each sentenced to serve a term in the House of Correction for one year, to pay a fine of \$1.00 each and the costs of the proceeding. This writ of error is prosecuted to review the judgment. The indictment contains two counts.

In one count it is charged in substance that the defendants on May 15, 1933, feloniously and violently did make an assault upon Louis Gall, Jr., and did then and there put Louis Gall in bodily fear and danger of his life, and that one wrist watch of the value of \$70 and one watch valued at \$15 were taken from the person and against the will of Louis Gall, and feloniously and by force and intimidation did rob, steal and carry away the property, and that they were at the time armed with a pistol. In the second count it is charged that the defendants made an assault upon Louis Gall, and did then and there put him in bodily fear and danger of his life, and that a wrist watch valued at \$70 and a watch valued at \$15, the property of Gall, were taken from his person and against his will feloniously and violently and by fear and intimidation. Nothing is before the court but the indictments,

IN SENATE
JANUARY 1934

REPORT OF THE SELECT COMMITTEE
ON THE JURY

v.

ANTHONY MORRIS and JOHN MORRIS
Defendants in error.

COMMONWEALTH

Opinion filed Dec. 19, 1934

On the 19th day of December, 1934, the Commonwealth of Massachusetts, by and through its Attorney General, filed in the Superior Court of the County of Suffolk a writ of error to review the judgment of the Superior Court of the County of Suffolk, entered on the 14th day of November, 1934, in the case of Anthony Morris and John Morris, Defendants, against the Commonwealth, Plaintiff. The judgment of the Superior Court, entered on the 14th day of November, 1934, was a judgment of acquittal, and the Commonwealth, by and through its Attorney General, filed a writ of error to review the judgment. The indictment contained two counts.

In one count it is charged in substance that the defendants on May 15, 1934, feloniously and violently did take and carry away from the person and against the will of Louis Bell, and did then and there put him in bodily fear and danger of his life, and that one watch of the value of \$10.00 was taken from the person and against the will of Louis Bell, and feloniously and by force and intimidation did rob, steal and carry away the property, and that they were at the time armed with a pistol. In the second count it is charged that the defendants made an assault upon Louis Bell, and did then and there put him in bodily fear and danger of his life, and that a wrist watch valued at \$10.00 and a watch valued at \$1.00, the property of Bell, were taken from his person and against his will feloniously and violently and by force and intimidation. Nothing is before the court but the indictments,

pleas of not guilty, a waiver of the jury, the finding of the court that they were guilty of the crime of petit larceny of property of the value of \$14.50 , the judgment of conviction and the sentence. No bill of exceptions was filed in the case. It is not intimated that defendants are not guilty of the crime of petit larceny, nor that the court was not justified in finding them guilty of such charge.

It is the contention of the defendants that the judgment rendered against them is void, because neither count in the indictment includes the offense of petit larceny, and that larceny "from the person", as charged in the second count, is a felony, regardless of the amount stolen, and that the trial court could not legally sentence the defendants for the crime of petit larceny without a waiver or nolle prosequi first having been entered by the State's Attorney as to so much of the indictment as charged the commission of the felony.

In People v. Hoffman, 236 Ill. App. 1, cited by defendants, this court said:

"It is true, as suggested by counsel for the State, that the amendment with reference to stealing from the person does not make such larceny a distinct and separate offense. It is still larceny, just as it is larceny whether the property stolen is less or more than \$15 in value."

In People v. Harris, 302 Ill. 590, also cited by defendants, there was an indictment for "larceny generally", as stated by the court, and the defendant was put on trial for larceny from the person, a greater offense and one carrying a more severe penalty than larceny or petit larceny, as defined by the statute. The court there said:

"The indictment was for larceny generally, and to put the defendant on trial for larceny from the person it would have been essential that the indictment should be so framed."

This case is not in point. In the instant case, as stated, while the indictment was for larceny from the person, the defendants were put on trial and convicted of the crime of petit

pleas of not guilty, a waiver of the jury, the finding of the court that they were guilty of the crime of petit larceny of property of the value of \$10.00, the judgment of conviction and the sentence. No bill of exceptions was filed in the case. It is not intimated that defendants are not guilty of the crime of petit larceny, nor that the court was not justified in finding them guilty of such charge. It is the contention of the defendants that the judgment rendered against them is void, because neither count in the indictment includes the offense of petit larceny, and that larceny, as charged in the second count, is a felony, regardless of the amount stolen, and that the trial court could not legally sentence the defendants for the crime of petit larceny without a waiver or nolle prosequi first having been entered by the State's Attorney as to so much of the indictment as charged the commission of the felony.

In People v. Hoffman, 235 Ill. App. 1, cited by

defendants, this court said:

"It is true, as suggested by counsel for the State, that the amendment with reference to stealing from the person does not make larceny a distinct and separate offense. It is still larceny, but as to it is larceny whether the property stolen is less or more than \$10 in value."

In People v. Hoffman, 235 Ill. App. 1, also cited by defendants, there was an indictment for "larceny generally", as stated by the court, and the defendant was put on trial for larceny from the person, a greater offense and one carrying a more severe penalty than larceny or petit larceny, as defined by the statute. The court there said:

"The indictment was for larceny generally, and to put the defendant on trial for larceny from the person it would have been essential that the indictment should be so framed."

This case is not in point. In the instant case, as

stated, while the indictment was for larceny from the person, the

defendants were put on trial and convicted of the crime of petit

larceny, a lesser offense.

In Carpenter v. People, 5 Ill. 197, the Supreme Court said:

"Where a defendant is put on trial on an accusation which includes an offense of an inferior degree, the jury may acquit of the higher offense and convict of the lesser, although there may be no count in the indictment specifically charging that particular offense. The greater includes the lesser offense of the same kindred character."

As stated by this court in People v. Hoffman, supra, whether the larceny committed is from the person or not, it is larceny just the same, and we hold that the charge of larceny from the person included the crime of petit larceny, and that it was not necessary for the court to enter a nolle prosequi as to the charge of larceny from the person. The judgment is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

larceny, a lesser offense.

In Wright v. People, 5 Ill. 127, the Supreme

Court said:

"There is a belief that it is not on trial on an accusa-
tion which includes an element of an inferior degree, the
jury may acquit of the higher offense and convict of the
lesser, although there may be no count in the indictment
specifically charging that particular offense. The greater
includes the lesser offense of the same kindred character."

As stated by this court in People v. Hoffman, 200 Ill.

whether the larceny committed is from the person or not, it is
larceny just the same, and we hold that the charge of larceny from
the person included the crime of petit larceny, and that it was not
necessary for the court to enter a nolo prosequi as to the charge
of larceny from the person. The judgment is affirmed.

AFFIRMED.

HEBER, J. and WOOD, J. CONCUR.

37365

PEOPLE OF THE STATE OF ILLINOIS,
(Plaintiff) Defendant in Error,
v.

WILLIAM MCGEE,

(Defendant) Plaintiff in Error.

ERROR TO

MUNICIPAL COURT
OF CHICAGO.

278 I.A. 621³

Opinion filed Dec. 19, 1934

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks the review of an order finding him guilty of contempt of court, and sentencing him to serve a term of six months in the County Jail.

It is insisted that the judgment should be reversed because the record does not show that defendant was present in open court at the time of the entry of the order and the adjudication that he was in contempt of court, and People v. Northup, Illinois Appellate Court No. 35880 and other cases are cited as authority. The abstract filed does not contain the complete order. An examination of the record shows the order to be as follows:

"Defendant present in open court. Finding defendant, guilty contempt of Court in Branch 43-1121 1/2 So. State St. of the Municipal Court of the City of Chicago, County of Cook, State of Illinois People of the State of Illinois vs. George Collins, case number 1272277, then pending and undetermined, the said defendant did act in a boisterous and improper manner before the Court in that the said defendant struck officer L. Steinberg, and used vile and abusive language, all of which conduct of said defendant, tended to impede and interrupt the proceedings and lessen the dignity of this court.

Judgment on finding the defendant guilty of Contempt of Court.

Defendant sentenced to County Jail for term of six (6) months."

It appears distinctly that the court found that the defendant was present in open court at the time the order was entered.

PEOPLE OF THE STATE OF ILLINOIS,
(Plaintiff) Defendant in Error,
v.
WILLIAM MOSES,
(Defendant) Plaintiff in Error.

Opinion filed Dec. 19, 1934

MR. JUSTICE PAUL DELVIGNE delivered the opinion of the court.
By this writ of error defendant seeks the review of an order finding him guilty of contempt of court, and sentencing him to serve a term of six months in the County Jail.
It is insisted that the judgment should be reversed because the record does not show that defendant was present in open court at the time of the entry of the order and the adjudication that he was in contempt of court, and People v. Harpung, Illinois Appellate Court No. 35800 and other cases are cited as authority. The aforesaid filed does not contain the complete order. An examination of the record shows the order to be as follows:

"Defendant present in open court, finding defendant guilty contempt of court in amount \$4-1131, 30. State St. of the Municipal Court of the City of Chicago, County of Cook, State of Illinois, books of the State of Illinois vs. George Collins, case number 137837, then pending and undetermined, the said defendant did set in a belligerent and improper manner before the Court in that the said defendant struck officer L. Steinhilber, and used vile and abusive language, all of which conduct of said defendant, tended to impede and interrupt the proceedings and lessen the dignity of this court.
Judgment on finding the defendant guilty of Contempt of Court.

Defendant sentenced to County Jail for term of six (6) months."

It appears distinctly that the court found that the

defendant was present in open court at the time the order was

entered.

It is also insisted that instead of stating that defendant "struck officer Steinberg and used vile and abusive language" in the presence of the court, the order should have stated that an assault was made upon the officer in the presence of the court.

There is no merit in either point. The judgment is affirmed.

AFFIRMED.

HEBEL, P.J. AND WILSON, J. CONCUR.

It is also insisted that instead of stating that defendant "struck Officer Weinberg on the wife and abusive language" in the presence of the court, the order should have stated that an assault was made upon the officer in the presence of the court. There is no merit in either claim. The judgment is

affirmed.

APPEAL.

HEBEL, P. J., and WIGG, J. WIGG.

37764

DE KALB TRUST AND SAVINGS BANK, a
banking corporation, of De Kalb,
Illinois, ELEANOR C. GOCHENCOUR,
ELI METCOFF and J. D. MARQUIS,

Plaintiffs and Appellees,

v.

DE PAUL EDUCATIONAL AID SOCIETY, A. C.
ALLYN & COMPANY, and JOHN C. MEINERS,
Individually and as Chairman of the
Bondholders Protective Committee,

Defendants and Appellants.

DE PAUL UNIVERSITY, FIRST NATIONAL BANK
OF CHICAGO, ILLINOIS MERCHANTS TRUST
COMPANY, now known as Continental Illinois
National Bank and Trust Company as Lessors
under Leases recorded as Doc. Nos. 9746977 and
9746978, and as "DISBURSING AGENT" and
"INVESTMENT TRUSTEE," JOHN W. GRACE and
URSULA GRACE LAVENDER, as Lessors under
lease recorded as Doc. No. 9746979, ADA S.
GARRETT, beneficiary under lease made by
Illinois Merchants Trust Company, BENJAMIN
FRANKLIN MEYER and TRUE WEBBER AND COMPANY, Inc.,

Defendants.

Opinion filed Dec. 19, 1934

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This case is governed by the opinion in case No.
37763, and the order entered in that case is controlling here.

REVERSED AND REMANDED WITH DIRECTIONS.

HEBEL, P.J. AND WILSON, J. CONCUR.

INTERLOCUTORY

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

278 I.A. 621⁴

37784

THE STATE OF ILLINOIS
COUNTY OF COOK
JANUARY 1, 1934

TESTIMONY

STATE OF ILLINOIS

COOK COUNTY

COOK COUNTY

THE STATE OF ILLINOIS
COUNTY OF COOK
JANUARY 1, 1934

Defendants and witnesses.

BEFORE ME, the undersigned authority, on this day personally appeared
JOHN J. WATSON, known to me to be the person whose name is subscribed
to the foregoing instrument, and acknowledged to me that he executed
the same for the purposes and consideration therein expressed.

1934 A.D. 1934

Notary Public

Opinion filed Dec. 19, 1934

THE COURT HAS REVIEWED THE OPINION OF THE COURT.

This case is governed by the opinion in case No.

37783, and the facts stated in that case is controlling here.

Reviewed and affirmed the decision.

HEARD, J. J. and J. J. J. J.

37488

ELIZABETH LIBMAN,

Complainant, Appellee,

v.

CHICAGO TITLE AND TRUST COMPANY, as
Trustee under Trust Deed recorded as
Document No. 9506113, et al.,

Defendants.

On Appeal of MARY L. KENT and AMOS W.
MARTIN, Trustees,

Defendants, Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

278 I.A. 622¹

Opinion filed Dec. 19, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree in a foreclosure proceeding finding the complainant Elizabeth Libman to be the owner and holder of a note for \$1,250.00 secured by a trust deed in which the Chicago Title & Trust Company was trustee; that there had been a default in payment by Morris Libman, the defendant, the owner of the equity, and ordering a sale of the premises in the event the amount found due, including interest and attorneys' fees were not paid within the time fixed by the court.

The cause was referred to a special commissioner to take proof and report his findings. Objections to the findings were filed by defendants Mary L. Kent and Amos W. Martin. As to the defendant Kent, it appears that she filed her demurrer to the amended bill of complaint which was overruled. No appeal was prayed from this order and for failure to file an answer the bill was taken as confessed as to her.

The original bill filed contained an allegation that the premises were occupied by John M. Houston and Della M. Houston under a contract for a warranty deed with one Winifred Salzman, the then owner of the premises, and that when the purchase price should

ALABAMA

Complaint, Appeal

v.

CHICAGO TITLE AND TRUST COMPANY, as
Trustee under Trust Deed recorded as
Document No. 380211, et al.

Defendants.

ON APPEAL OF MARY L. KENT and AMOS W.
MARTIN, Trustees.

Defendants, Appellants.

Opinion filed Dec. 19, 1934

MR. JUSTICE WILSON delivered the opinion of the court.
This is an appeal from a decree in a foreclosure pro-
ceeding finding the complainant Chicago Title and Trust Company to be the owner and
holder of a note for \$1,500.00 secured by a trust deed in which the
Chicago Title and Trust Company was trustee; that there had been a
default in payment by Martin and Amos W. Martin, the owner of the
equity, and ordering a sale of the premises in the event the amount
found due, including interest and attorneys' fees were not paid within
the time fixed by the court.

The cause was referred to a special commissioner to
take proof and report his findings. Objections to the findings were
filed by defendants Mary L. Kent and Amos W. Martin. As to the
defendant Kent, it appears that she filed her demurrer to the amended
bill of complaint which was overruled. No appeal was prayed from
this order and for failure to file an answer the bill was taken as
conceded as to her.

The original bill filed contained an allegation that
the premises were occupied by John A. Houston and Della W. Houston
under a contract for a warranty deed with one Winifred Salzman, the
then owner of the premises, and that when the purchase price should

378 I.A. 622
COOK COUNTY.
SUPERIOR COURT.
ALABAMA

be paid they would be entitled to rights superior to those of complainants. The bill was subsequently amended as to this recital so as to charge that the rights and interests of the Houstons, if any, were subordinate to those of complainant. Other defendants were made parties to the foreclosure proceeding under the allegation that they had or claimed to have some right, title or interest in the property but that such interest, if any, was subordinate to that of complainant. The defendants were Salzman, the previous owner of the premises, the Houstons already referred to, Carroll and Shipnes. Subsequently, the bill was dismissed as to Shipnes and Salzman and Kent and Martin were made additional defendants. On the hearing it developed that Salzman had parted with her interest. There is some evidence that Shipnes either owned or held a first mortgage on the premises and claimed some of the purchase money, but he has not seen fit to make any claim and as the record stands he has no disclosed interest.

The principal contention of the defendant Martin appears to be that he had an interest in the contract between the Houstons and Salzman, and that the complainant Libman was bound by her admission in the original bill of complaint that this contract of purchase was superior to the rights of complainant and the court should have so adjudicated. The contract relied upon by defendant Martin was before the Circuit Court of this county in an action by Carroll against Salzman and one Bisno. Carroll claimed an interest in the same and was awarded a decree for \$1,200.00 with interest and a lien against the contract. Subsequently, Kent and Martin, as trustees, obtained a judgment on a creditors' bill against Carroll and, therefore, claim under that judgment. The complainant here was not a party to any of the other proceedings and therefore not bound by them. The special commissioners found, and we find it correct, that the trust deed here was made, executed, delivered

be paid they would be entitled to their proportion of the proceeds of the sale of the property. The bill was accordingly amended so as to charge that the rights and interests of the respondents, if any, were subordinate to those of complainant. Other defendants were added parties to the proceedings proceeding under the allegation that they had or claimed to have some right, title or interest in the property but that such interest, if any, was subordinate to that of complainant. The defendants were called, the previous owner of the premises, the respondents already referred to, Carroll and Whynes. Subsequently, the bill was dismissed as to Whynes and Johnson and Kent and Martin were made additional defendants. On the hearing it developed that Johnson had parties with an interest. There is some evidence that Whynes either owned or held a first mortgage on the premises and claimed some of the purchase money, but it has not been left to make any claim and as the record stands he has no disclosed interest.

The principal contention of the defendant Martin

appears to be that he had an interest in the contract between the respondents and Johnson, and that the complainant Johnson was bound by her admission in the original bill of complaint that this contract of purchase was superior to the rights of complainant and the court should have so adjudicated. The contract relied upon by defendant Martin was before the Circuit Court of this county in an action by Carroll against Johnson and one alias. Carroll claimed an interest in the same and was awarded a decree for \$1,200.00 in interest and a lien against the contract. Subsequently, Kent and Martin, as trustees, obtained judgment on a creditor's bill against Carroll and, therefore, claim under that judgment. The complainant here was not a party to any of the other proceedings and therefore not bound by them. The special commissioners found, and we find it correct, that the trust deed here was made, executed, delivered

and recorded before the contract of purchase between Salzman and the Houstons.

The admission in the original bill of complaint was not binding upon complainant in view of the amendment, and the facts as afterwards proven. Complainant's rights under her trust deed were superior to any rights acquired by the contract of purchase or any one claiming thereunder. No citations are necessary to support this conclusion.

For the reasons already stated there is no force in the position that it was error to dismiss Shipnes and Salzman out of the proceeding.

The trust deed entitled complainant to the rents, issues and profits derived from the property as part of the security, by reason of the loan. This would include the payments made from month to month by the tenant to the receiver appointed by the court in this proceeding, and directed by the chancellor to collect such income, rent or profits. The defendants filed no cross bill asking for affirmative relief. The receiver collected \$40.00 per month from the Houstons as rent under order of court. There is no force in defendant's position that this should be applied on its claim against the purchase contract.

Finding no error in the decree of the Superior Court it is, therefore, affirmed.

DECREE AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

and recorded before the contract of purchase between Salzman and the Howatons.

The objection in the original bill of complaint was not binding upon complainant in view of the amendment, and the facts as afterwards shown. Complainant's rights under her trust deed were superior to any rights accruing by the contract of purchase or any one claiming thereunder. No citations are necessary to support this conclusion.

For the reasons already stated there is no force in the position that it was error to dismiss Shipman and Salzman out of the proceeding.

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Finding no error in the decree of the Superior Court it is, therefore, affirmed.

DECEMBER TWENTY.

WESLEY, J. J. and HALL, J. J. CONCUR.

37513

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

FLOYD CALDWELL,

Plaintiff in Error.

ERROR TO

CRIMINAL COURT

COOK COUNTY.

278 I.A. 622²

Opinion filed Dec. 19, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The defendant Floyd Caldwell was found guilty of contributing to the delinquency of a minor child and sentenced to the house of correction for the term of one year and a fine of one dollar. A jury was waived and the cause was submitted to the court who heard the witnesses and entered the judgment appealed from. No question of law is raised upon this appeal and we are concerned only with the evidence.

The prosecuting witness Margaret Jenkins was first examined on a voir dire for the purpose of testing her intelligence, her understanding of an oath, and her mental reaction to questions asked. Her answers to the questions propounded in our opinion qualified her as a witness. When placed upon the stand she testified that she knew the defendant and that she saw him while with her brother and another small girl; that he gave her brother a nickle and told him to take the other girl and get some ice cream; that he then took her, the prosecuting witness, up to the top of the laundry building where he worked and sat her on a high box and touched her on her private parts; that he cuddled and kissed her. It is unnecessary to discuss her testimony in detail, but we are of the opinion that her answers to the questions were intelligent and responsive.

Margaret Jenkins, the mother of the prosecuting witness, testified that on the 20th day of May, 1933, about twenty

REPORT OF THE JURY IN CASE NO. 10,000

Defendant: [Name]

v.

State of California

Indictment No. 10,000

Opinion filed Dec. 19, 1934

THE JURY IN CASE NO. 10,000

The defendant, [Name], was found guilty of

contributing to the delinquency of a minor child and sentenced to the house of correction for the term of one year and a fine of one dollar. A jury was sworn and the cause was submitted to the court who heard the witnesses and entered the judgment aforesaid from.

No question of law is raised upon this appeal and we are concerned only with the evidence.

The prosecuting witness, [Name], testified that

examined on a voir dire for the purpose of testing her intelligence, her understanding of an oath, and her mental reaction to questions

asked. Her answers to the questions were recorded in our opinion

deposited her as a witness. When placed upon the stand she testified

that she knew the defendant and that she saw him while with her

brother and another girl; that she gave her brother a nickel and told him to take the other girl and get some ice cream; that

he then took her, the prosecuting witness, up to the top of the

laundry building where he worked and sat her on a high box and

touched her on her private parts; that he cuddled and kissed her.

It is unnecessary to discuss her testimony in detail, but we are

of the opinion that her answers to the questions were intelligent

and responsive.

[Name], the mother of the prosecuting

witness, testified that on the 20th day of May, 1934, about twenty

minutes to eight she went to the Howard Laundry, where the defendant was employed, to look for her daughter and about 8 o'clock that evening she saw her coming out of the laundry. She further testified that this laundry was across the alley from where she lived.

Albert Jenkins, father of the prosecuting witness, testified that he saw the defendant in front of the entrance to the laundry and struck the defendant; that the defendant said, "Can't we do something about this?" The witness then asked defendant why he had the little girl in the laundry and he replied that he, the defendant, was lonesome and that the defendant admitted that he had kissed the child, and that he was very much ashamed of himself.

William Griffin, a police officer who made the arrest shortly after 8 o'clock of that night, testified that when he was summoned by the mother of the child he went through the laundry building and found the doors were all locked.

The defendant testified that he had been working around the laundry that evening cleaning up, but denied that anything had occurred or that he told the father of the child that he had kissed the girl or fondled her, but that the little girl had been in and out of the laundry every day; that there was an entrance to the rear of the laundry which was unlocked and that the office boy stayed until 8 o'clock.

Clarence Bigler, a witness on behalf of the defendant, testified that he lived with the defendant and saw the defendant at the Howard Laundry about 7 o'clock and that he, the witness, left the laundry about ten minutes to eight; that he was there continuously from 7 o'clock until the time he left, but that he did not see the little girl in the laundry.

Richard Harder testified that he was an office boy employed at the Howard Laundry and worked until 8 o'clock that night;

minutes to eight she went to the Howard Laundry, where the defendant was employed, to look for her daughter and about 8 o'clock that evening she saw her coming out of the laundry. She further testified that this laundry was across the alley from where she lived.

Albert Lamkins, father of the prosecuting witness, testified that he saw the defendant in front of the entrance to the laundry and struck the defendant; that the defendant said, "Don't do something about this." The witness then asked defendant why he had the little girl in the laundry and he replied that he, the defendant, was homesick and that the defendant admitted that he had kissed the child, and that he was very much ashamed of himself.

William Griffin, a police officer who made the arrest shortly after 8 o'clock of that night, testified that when he was summoned by the mother of the child he went through the laundry building and found the doors were all locked.

The defendant testified that he had been working around the laundry that evening cleaning up, but denied that anything had occurred or that he told the father of the child that he had kissed the girl or fondled her, but that the little girl had been in and out of the laundry every day; that there was an entrance to the rear of the laundry which was unlocked and that the office boy stayed until 8 o'clock.

Clarence Stiles, a witness on behalf of the defendant, testified that he lived with the defendant and saw the defendant at the Howard Laundry about 7 o'clock and that he, the witness, left the laundry about ten minutes to eight; that he was there continuously from 7 o'clock until the time he left, but that he did not see the little girl in the laundry.

Richard Barber testified that he was an office boy employed at the Howard Laundry and worked until 8 o'clock that night;

that he left the laundry at 8 o'clock and that the complaining witness was not in the laundry during that time. On cross-examination by the court this witness testified that Bigler brought Caldwell, the defendant, to the laundry about 7:30 or 8 o'clock and remained about ten minutes. The testimony of this witness is negative in character. The offense was charged to have been committed on the top floor of the building, and there was a rear as well as a front entrance to the premises.

Defendant contends that there was error in that the trial court permitted the prosecuting witness to testify because of her youth, lack of knowledge and meaning of the oath. An examination of her testimony shows that she comprehended the meaning of an oath and was possessed of an understanding of the moral obligation to speak the truth.

In the case of People v. Lewis, 253 Ill. 281, where a child of 6 years was permitted to testify before a jury, wherein the defendant was charged with rape, the court in its opinion, says:

"From her whole examination we are unable to say that the court abused its discretion in permitting the child to testify. She disclosed that she understood the difference between right and wrong, that she appreciated the moral obligation to speak the truth, and that she understood when she was sworn that it meant she was to tell the truth. 'Intelligence, ability to comprehend the meaning of an oath and the moral obligation to speak the truth, and not age, are the tests by which the competency of a child to give testimony is determined.' (Shannon v. Swanson, 208 Ill. 52.) The jury saw and heard the child testify, and it was for them to determine the weight and value which should be given to her testimony."

Cases of the character of that involved in this proceeding are extremely difficult to defend and this court is thoroughly appreciative of that fact. At the same time they are often equally hard to prove. It is seldom that there are witnesses to the occurrence. The argument that the minds of the jurors may become inflamed by reason of the mere charge is lacking in the present case because

that he left the laundry at 8 o'clock and that the complaining witness was not in the laundry during that time. On cross-examination by the court this witness testified that Sigler brought Caldwell, the defendant, to the laundry about 7:30 or 8 o'clock and remained about ten minutes. The testimony of this witness is negative in character. The offense was charged to have been committed on the top floor of the building, and there was a rear as well as a front entrance to the premises.

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In view of the character of that involved in this proceeding we extremely difficult to defend and this court is thoroughly appreciative of that fact, at the same time they are often equally hard to prove. It is seldom that there are witnesses to the occurrence. The argument that the minds of the jurors may become inflamed by reason of the mere charge is lacking in the present case because

of the fact that it was tried by the court without a jury. We can assume that the cause was heard free from passion or prejudice and the finding based on the evidence alone. The defendant was a married man and bore a fair reputation in the community in which he lived. On the other hand there appears to be no apparent reason why the prosecuting witness would undertake to present a story such as she told to the court unless it was the truth. The trial court withheld judgment for a considerable period of time after the hearing before announcing his finding and evidently after a careful consideration of the cause. He had the advantage of seeing the witnesses and observing their demeanor while upon the stand, which is a privilege not granted to a court of review. We are, for that reason, unable to say that the finding of the trial court was not warranted by the evidence and the judgment of the Criminal Court is, therefore, affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

of the fact that it was stated by the court without a jury. It was
 stated that the cause was heard free from passion or prejudice and
 the finding based on the evidence alone. The defendant was a married
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 the case. He had the advantage of seeing the witnesses and observing
 their demeanor while upon the stand, which is a privilege not granted
 to a court of review. He was, for that reason, unable to say that
 the finding of the trial court was not warranted by the evidence
 and the judgment of the criminal court is, therefore, affirmed.

JUDGMENT AFFIRMED.

WHEELER, J. A. AND WARD, J. CONCUR.

37543

CARL M. WHITE,

Appellant,

v.

ARNOLD FOLEY,

Appellee.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

278 I.A. 622³

Opinion filed Dec. 19, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The plaintiff, Carl M. White, took judgment by confession for \$54.84, on a note dated February 24, 1933. The note was for \$40, payable in installments with interest at 7 per cent per annum from date, was signed by the defendant and authorized the plaintiff to take judgment in case of default. The defendant obtained leave to open up the judgment and to defend and in his affidavit of defense in support of his motion to vacate the judgment charged usury and also that he had received no money or other consideration for the note.

From the record it appears that there had been some previous transaction between the parties, but that on February 21, 1933, plaintiff served notice of an assignment, probably of wages, and on February 23, the defendant Foley appeared at his office, the assignment was released and the new note involved in this proceeding was executed. The signing of the new note is not in dispute by the defendant and it is evident that all prior obligations had been satisfied.

We are not concerned with the question of usury in previous transactions in view of the settlement of these accounts and the giving of the new note. Riddle v. Rosenfeld, 103 Ill. 600. The only question before us is whether the new note was usurious and whether or not the defendant received the consideration named therein. The note on its face is regular and for \$40.00 with interest at 7 per cent.

The plaintiff testified that at the time of the giving of the note he executed and delivered his check for \$40.00 to the

37543

CARL A. WITTE,

Defendant,

v.

ARMOLD KOWAL,

Plaintiff.

CHICAGO, ILL.

OF CHICAGO.

200 A.A. 622

Opinion filed Dec. 19, 1934

ALL JUSTICE ALICE J. WILSON OF THE CIRCUIT OF THE COURT.

The plaintiff, Carl A. Witte, took judgment by default-

ion for \$54.80, on a note dated February 14, 1931. The note was for

40, payable in installments with interest at 7 per cent per annum

from date, was signed by the defendant and authorized the plaintiff

to take judgment in case of default. The defendant obtained leave

to open up the judgment and to defend and in his affidavit of defense

in support of his motion to vacate the judgment charged many and

also that he had received no money or other consideration for the note.

From the record it appears that there had been some

previous transaction between the parties, but that on February 11,

1931, plaintiff served notice of an assignment, possibly of wages,

and on February 13, the defendant duly appeared at his office, the

assignment was released and the new note involved in this proceeding

was executed. The signing of the new note is not in dispute by

the defendant and it is evident that all prior obligations had been

settled.

He was not concerned with the question of money in

previous transactions in view of the settlement of these accounts and

the living of the new note. Witte v. Kowal, 103 Ill. 800. The

only question before us is whether the new note was valid and

whether or not the defendant received the consideration named therein.

The note on its face is regular and for \$40.00 with interest at

7 per cent.

The plaintiff testified that at the time of the giving

of the note he executed and delivered his check for \$40.00 to the

defendant. The check is in evidence. It is dated February 24, 1933, the same date as that of the note and is made payable to Arnold Foley, the defendant herein, and signed by Carl M. White. On the reverse side of the check appears the endorsement, "Arnold Foley", and this is the only endorsement on the instrument. The check also bears the stamp of the bank upon which it is drawn, showing that it had been paid in the regular course of business.

The defendant testified that he received the check from the plaintiff, endorsed it and handed it back to the girl in plaintiff's office. Plaintiff denies that the defendant endorsed the check and handed it back to the girl or anyone else in his office, but stated that it went through the bank and came into his hands in the regular course of business, together with his other bank checks.

The note on its face is regular and the signature of the defendant is admitted and it should take clear evidence to overcome the presumption of regularity. The check is made out to the defendant and on the same day that the note was executed and bears the endorsement of the defendant only. It is well known that a bank ordinarily does not cash checks when presented by other than the payee, unless endorsed by the one presenting it. The fact that the check was made to Foley and delivered to him and none other, is evidence of payment which should not be lightly disregarded. We believe that the defendant has failed to overcome a prima facie case made out by the introduction of the note and check, coupled with the evidence of the plaintiff, and for that reason the judgment is reversed and the cause remanded with directions to expunge from the record the judgment entered October 4, 1933, and that the judgment by confession entered on July 22, 1933, be declared in full force and effect and to take such other procedure as is necessary in conformity with the views expressed in this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTION.

HEBEL, P.J. AND HALL, J. CONCUR.

defendant. The check is in evidence. It is dated February 24, 1937. The check is a part of the note and is made payable to Arnold Foley, the defendant herein, and signed by him. On the reverse side of the check appears the endorsement, "Arnold Foley", and there is the only endorsement on the instrument. The check also bears the stamp of the bank upon which it is drawn, showing that it had been paid in the regular course of business.

The defendant testified that he received the check from two plaintiffs, and handed it over to the first in plaintiff's office. Plaintiff denies that the defendant endorsed the check and stated it took to the bank or anyone else in his office, but stated that it was through the bank and came into his hands in the regular course of business, together with his other bank checks.

The note on its face is regular and the signature of the defendant is admitted and it should take clear evidence to overcome the presumption of regularity. The check is made out to the defendant and on the back the note was executed and bears the endorsement of the defendant only. It is well known that a bank ordinarily does not cash checks when presented by other than the payee, unless endorsed by the one presenting it. The fact that the check was made to Foley and delivered to him and none other, is evidence of payment which should not be lightly disregarded. He believes that the defendant has failed to overcome a prima facie case made out by the introduction of the note and check, coupled with the evidence of the plaintiff, and for that reason the judgment is reversed and the cause remanded with directions to expunge from the record the judgment entered November 4, 1936, and set the judgment by confession entered on July 22, 1937, as absolute in full force and effect and to take such other procedure as is necessary in conformity with the views expressed in this opinion.

37573

ETTA WOLF,

Defendant in Error,

v.

CHINA CATERING CO., D. B. A.
BEACH VIEW GARDENS, HONE WU,
TOM CHAN and STANLEY G. KAN,

Plaintiffs in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

273 I.A. 622⁴

Opinion filed Dec. 19, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

October 31, 1922, Henry W. Rubloff and Morris Wolock, the lessors and owners, executed a written lease to Tom Chan, Stanley G. Kan, Henry Eng and Hone Wu to certain premises located on the second floor of the building at 804 Wilson avenue in the City of Chicago. From the evidence it developed that Wolock had no interest in the real estate, but that the real owner was Rubloff. This lease was subsequently assigned by Rubloff and Wolock to Henry Wolf and Etta Wolf. Rubloff subsequently conveyed the property in fee and Henry Wolf and Etta Wolf became the owners. Henry Wolf died and Etta Wolf became entitled to her husband's interest by reason of survivorship. At the time she brought this action she was, therefore, the assignee of the lessee Rubloff and Wolock and also the owner of the premises. This action is brought by her to recover rent for the months of March and April, 1932, claimed to be due from the China Catering Co., doing business as Beach View Gardens, Hone Wu, Tom Chan and Stanley G. Kan.

The China Catering Co. was organized for the purpose of conducting a restaurant on the premises. They paid the rent for the period from July 1930 until February 28, 1932, but did not pay the rent for March and April of the latter year, although the premises were occupied by the China Catering Co. until April 26, 1932.

Tom Chan and Stanley G. Kan were two of the original lessees and were liable for the rent unless released by the landlord.

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the lessors and certain written leases to Tom Chan and Stanley G. Chan, Henry and Rose in certain premises located on the second floor of the building at 844 Fifth Avenue in the City of Chicago. From the evidence it developed that Chan had no interest in the real estate, but that the real owner was Wolf. This lease was subsequently assigned by Wolf to Henry and Rose. Henry and Rose became the owners. Henry and Rose and the Wolf became entitled to her husband's interest by reason of survivorship. At the time she brought this action she was, therefore, the assignee of the lease of Wolf and Rose and also the owner of the premises. This action is brought by her to recover rent for the months of March and April, 1937, claimed to be due from the China Catering Co., doing business as Manch Woon Restaurant, Room 11, Tom Chan and Stanley G. Chan.

The China Catering Co. was organized for the purpose of conducting a restaurant on the premises. They paid the rent for the period from July 1935 until February 28, 1937, but did not pay the rent for March and April of the latter year, although the premises were occupied by the China Catering Co. until April 30, 1937.

Tom Chan and Stanley G. Chan were two of the original partners and were liable for the rent unpaid released by the defendant.

The defendants, Chan and Kan contend that they were released when the China Catering Co. moved in. The rule is clear, however, that acceptance of rent from a person who enters the premises under authority of the original lessee, does not amount to a cancellation of the original lease nor release the lessee therein, Barnes v. Northern Trust Co., 169 Ill. 112; Thompson v. Western Casket Co., 219 Ill. App.184.

The statute of frauds is not available to the defendants because the lessees had entered into possession and their subtenants as well as themselves were liable for the rent for March and April during the period of time that they occupied the premises. The lease had been fully executed, so far as this suit is concerned.

There is no merit in defendant's position that a proper foundation had not been laid in support of the introduction of plaintiff's exhibits 3 and 5. Exhibit 3 was the deed from Rubloff and his wife and others, to Henry Wolf. Exhibit 4 was a deed from Henry Wolf and Etta Wolf to Arthur Wolf. Exhibit 5 was a deed from Arthur Wolf and his wife to Henry and Etta Wolf, not as tenants in common but as joint tenants. Exhibit 6 was a copy of letters testamentary showing the death of Henry Wolf. This evidence was sufficiently specific to place the title in plaintiff, particularly as the question was not raised in defendants' affidavit of merits and it appears that rent had been paid to the plaintiff prior to the suit in question and her right to collect evidently recognized.

The burden of proof was upon the defendants to show a cancellation of the lease so far as they were concerned. The mere fact that rent was collected from the China Catering Co. was not, in and of itself, sufficient to overcome the burden.

We believe that the Municipal Court upon the evidence properly entered judgment in favor of the plaintiff and, for the reasons expressed in this opinion, the judgment is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

37529

NELLIE RAMSEY,
Appellee,

vs.

DR. J. FRANK ARMSTRONG,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

278 I.A. 622⁵

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

November 3, 1932, plaintiff brought suit against defendant to recover \$2000 claimed to be due her by virtue of an oral promise made by defendant to plaintiff that he would support and maintain a child born to her out of wedlock (plaintiff claiming that defendant was the father of the child) provided plaintiff would not institute bastardy proceedings against defendant. Defendant denied that he had made any such promise and denied that he was the father of the child. There was a jury trial and a verdict and judgment in plaintiff's favor for \$1000, and defendant appeals.

Plaintiff's evidence is to the effect that in October, 1928, she was eighteen years old, unmarried, and her name was Nellie Young; that she had some physical ailment and the latter part of October went to defendant's office, a few blocks from her home, for treatment; defendant was a practicing physician and treated her on three occasions; that the treatments were about a week apart, the last one being November 12th, on which date defendant seduced her; that on that date she went to the office about eight o'clock in the evening, as defendant had requested her to do when she visited his office a week previous; that her little sister went with her; that when she got to the Doctor's office there were four other patients in the reception room. She further testified that about a week thereafter she again called at plaintiff's office and advised him of her condition, which indicated that she might be pregnant; that the Doctor gave her some pills which she took with her but which she was unable to swallow; that she then advised the Doctor ^{of} this

fact and he gave her some liquid medicine which she could not take because it did not agree with her. She further testified that the following April she visited the Doctor's office and talked to him about the fact that she would have to go to the hospital to be confined; that she asked him, "What am I going to tell them" at the hospital, and that he said, "Give anybody's name. *** just so you don't give my name," and that he would take care of the baby when it came; that the baby was born July 27, 1929, at Cook County hospital; that about two months afterward plaintiff called with the baby at the defendant's office, and "The Doctor asked me about the baby's weight when it was born; he said, 'Gee, what a fine son we have.*** The baby looks like me.' He said, 'At first, I thought you were trying to trick me;'" that afterward she called him up nearly every week and asked him for money to support the child; that he told her he would take care of the matter but did not have any money; she further testified that when the baby was about one and one-half years old she again went to his office; she told defendant he had been promising to take care of the baby but had not done so, and stated that if he did not do so she would take him into the Bastardy court, and he thereupon stated that if she would not do so he would take care of the baby but that he did not have any money then. She never filed a bastardy case against him. Plaintiff further testified that defendant gave her no money at any time and that she was married in June, 1932, but was separated from her husband at the time of the trial, January 16, 1934, at which time the baby was about four and one-half years of age.

Defendant testified that he was a married man and had been a practicing physician in Chicago for more than twenty years and had maintained offices at the same address for fourteen years; that for twenty years he had been employed by the City of Chicago as a physician, where he worked during the mornings and in the afternoon

fact and he gave me some financial assistance which was not taken because it did not agree with me. The doctor testified that the following April he visited the doctor's office and talked to him about the fact that his record gave so to the hospital to be confined; that he asked him, "What do I want to tell them at the hospital, and what do I want to tell them at the hospital when don't give me any?" and that he would have come of the body when it came; that the body was born July 10, 1932, at about 10:00 AM hospital; that about two months afterward physically called with the baby at the defendant's office, and the doctor asked me about the baby's weight - and it was born; he said, "Yes, well, a little way have, - the baby looks like a little girl, but I thought you were trying to trick me;" that afterward he called him up nearly every week and asked him for money to support the child; that he told her he would take care of the matter but he did not have any money; the doctor testified that when the baby was about one and one-half years old the doctor went to his office; and this defendant had been promised to take care of the baby but had not done so, and stated that if he did not do so he would take him into the district court, and the defendant stated that if he would not do so he would take care of the baby but that he did not have any money then. The never filed a bastardy case against him. Plaintiff further testified that defendant gave her no money at any time and that she was married in June, 1932, but was separated from her husband at the time of the trial, January 10, 1934, at which time the baby was about four and one-half years of age.

Defendant testified that he was a married man and had been a practicing physician in Chicago for more than twenty years and had maintained offices at the same address for fourteen years; that for twenty years he had been employed by the City of Chicago as a physician, where he worked during the mornings and in the afternoon

practiced his profession at his office; that he treated plaintiff on two occasions in the latter part of October, 1928; that the last time she called was November 8, 1928, but that he gave her no treatment at that time because plaintiff gave him information that would indicate she was pregnant; that he never saw her from that time until September 20, 1932, when she came to his office with the baby and wanted him to give her money to support the baby, claiming he was its father; that he refused to do so because he had had no improper relations with her. He denied that she had called at his office in April, 1929, and that she then told him she would soon be required to go to a hospital for confinement.

In addition to the testimony given by plaintiff, as hereinbefore mentioned, she testified on cross-examination that she had a boy friend and "I told my boy friend all about it.*** I told him I was pregnant. *** I didn't want to get him in no trouble, somebody else's trouble;" that she told him to disappear and he did so.

There is other evidence in the record which we think it unnecessary to mention here. We have considered all the evidence and have reached the conclusion that the verdict of the jury, to the effect that defendant was the father of the child and had promised plaintiff he would support the child, is against the manifest weight of the evidence.

It is admitted by counsel for plaintiff that at the time plaintiff claims to have been seduced by defendant she offered no resistance and made no outcry. The evidence shows that the Doctor's office consisted of a reception room and a private room, and plaintiff testified that at the time she claims to have been attacked by defendant the reception room was full of people waiting to see defendant. These circumstances, taken in connection with plaintiff's testimony concerning her boy friend, which we have above adverted to, and the fact that although plaintiff claims that she was pre-

quently demanding money from defendant and he was continually promising her money to support the child but never gave her any, and that the suit was not brought until about three years and four months after the baby was born, lead us to the conclusion that the finding and judgment ought not to stand.

Defendant contends that it was improper to exhibit the child to the jury, but we think this was not error. At the time of the trial the child was about four and one-half years of age. Scott v. Donovan, 153 Mass. 378; State v. Anderson, 63 Utah, 171; 1 Wignore On Evidence, sec. 166 (1st ed.).

In the Scott case, in which the paternity of a bastard child was involved, Mr. Justice Hughes, in speaking for the court, said (p. 379): "It has been decided in this Commonwealth that the child may be exhibited to the jury. We see no sufficient reason for reconsidering the decision, or for taking a distinction according to age. The youth of the child goes rather to the weight of the evidence."

In State v. Anderson, supra, the Supreme Court of Utah held that in a bastardy proceeding a child eight months of age was admissible in evidence before the jury.

And in discussing this question Professor Wignore in his work on evidence says (vol. 1, sec. 166, 1st ed.): "The English practice seems always to have admitted this evidence without question. In the United States the early practice was probably the same; but as the chief use of the evidence was found in filiation proceedings, to charge the defendant with the paternity of a bastard, the possible abuses of the evidence led to an unfortunate questioning of its validity under any circumstances." The author then says that the holding in some cases, that it was error to exhibit the child before a jury, was through a misunderstanding of the law, and continuing says: "The sound rule is to admit the ^{fact or} similarity of specific

traits, however presented, provided the child is in the opinion of the trial court old enough to possess settled features or other corporal indications. It is to be noted that the evidence is relevant not merely in bastardy proceedings, but also in trying the legitimacy of a child born during marriage, whenever the presumption of legitimacy allows the issue to be raised *** as well as occasionally in other proceedings."

For the reasons stated the judgment of the Municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely and Matchett, JJ., concur.

the testimony of a child born during marriage, and even the pre-
sumption of legitimacy which the law is to reject, he will be
is relevant not merely in contrary circumstances, but in the trial
other material, however. It is to be noted that the evidence
of the trial would be made to become a part of the evidence of
trial, and any evidence, provided the child is in the position

of Chicago is twenty and the other counties
for the reasons stated in the report of the Chicago County
of Chicago is twenty and the other counties

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37588

DOROTHY KABAT by John Kabat,
her Father and Next Friend,
Appellee,

vs.

FRANK BIEDRONSKI,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

278 I.A. 623¹

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against the defendant to recover damages for personal injuries claimed to have been sustained by her through the negligence of the defendant in burning rubbish in a wire basket or container in an alley, as a result of which plaintiff, a child four years and three months old, was severely burned. There was a trial before the court without a jury, a finding and judgment in plaintiff's favor for \$4500, and defendant appeals.

The record discloses that on May 22, 1931, defendant was conducting a grocery and meat market at 120th place and Indiana avenue, Chicago, and had been in such business at that place for a number of years; and there is evidence to the effect that covering a considerable period of time waste and refuse from the store would be placed in a wire basket about three feet high and two feet in diameter, in the alley a short distance from the store; that on the day in question plaintiff, a child of four years and three months, was playing with other children near the basket in the alley; defendant's step-daughter, twenty-three years of age, set fire to the contents of the basket, and as the children were playing plaintiff's dress caught fire and she was severely burned.

Defendant contends (1) that the evidence fails to prove the negligence charged in the declaration, and (2) that the judgment is excessive. In support of the first point defendant's counsel

say that in each of the three counts of plaintiff's declaration it is alleged that "flames, sparks and burning material were being then and there emitted and blown violently from said fire out through said wire basket and its openings," and "that by reason of the premises and as a proximate and direct result of the failure of said Defendant by and through his agents and servants, *** plaintiff's clothing was then and there ignited by said fire, sparks and burning material emitted and blown from the said wire basket or container." Counsel argue that to sustain a judgment under this declaration, it is essential that plaintiff prove that the fire and sparks were emitted and blown from the wire basket and that plaintiff's clothing was ignited thereby; that no witness testified flames came out through the sides of the basket and ignited plaintiff's clothing or that sparks were emitted or blown from the basket which ignited plaintiff's clothing. We think this contention cannot be sustained. There is evidence to the effect that defendant's step-daughter, who was working in his store, set fire to the refuse in the basket and plaintiff's clothing caught fire from the flames from the basket. The step-daughter testified for defendant and denied that she worked in the store and that she had ever set fire to the refuse, but the most that can be said is that this was a disputed question of fact, and there is no contention that the finding is against the weight of the evidence; the only argument is that the proof did not sustain the allegations of the declaration. We think the contention cannot be sustained. There was no substantial variance between the allegations of the declaration and the evidence. There is evidence that the wires of the basket were four inches apart and obviously if papers were in the basket, as the evidence indicates, and they were set on fire, the flames would come out between the wires of the basket.

(2) Is the judgment so excessive as to warrant interference

very that in fact of the three points of the investigation is
 is alleged that "first, second and third" and "fourth" were
 then and there omitted and then violently from the fire
 through the fire barrel and its opening," and "last by reason of
 the premises and as a consequence the direct result of the failure of
 said defendant to not through his agents and servants, "the defendant's
 clothing was then and there omitted by said fire, again and fur-
 ing material omitted and then from the said fire barrel or con-
 tainer." Counsel argues that he would not admit under this doc-
 trine, it is essential that plaintiff prove that the fire and
 again were omitted and then from the fire barrel and that plain-
 tiff's clothing was omitted; that no witness testified
 flames came out from the barrel and that plaintiff's
 tiff's clothing or last garment were omitted or shown from the barrel
 which ignited the plaintiff's clothing. He thinks this contention cannot
 be sustained. There is evidence to the effect that defendant's
 step-daughter, who was working in his store, saw fire in the refuse
 in the barrel and testified that she saw the flames
 from the barrel. The step-daughter testified that she saw the fire
 and that she worked in the store and that she saw the fire
 to the refuse, but she said that she saw it in the refuse as a
 disputed question at trial, and there is no contention that the fire
 was against the light of the witness; the only contention is
 that the proof did not sustain the allegations of the investigation.
 We think the contention cannot be sustained. There was no substan-
 tial variance between the allegations of the investigation and the
 evidence. There is evidence that the fire of the barrel were four
 inches apart and obviously if papers were in the barrel, as the
 evidence indicates, and they were set on fire, the flames would
 come out between the fire of the barrel.

(2) It is the judgment so excessive as to warrant interference

on our part? Plaintiff's mother testified that she heard her child screaming and rushed out, took the child, whose clothing was on fire, into the house; that she put the fire out, removed the child's clothing, and sent for a doctor; that one of the child's thighs was burned nearly all the way around and the entire length; that the leg was all raw and that the leg got smaller and did not heal for about nine months, during which time the child suffered greatly; the bandages had to be changed twice a day; that the child was in bed about a month and was not well at the time of the trial, which was about 2½ years after the accident.

Dr. Novak, the attending physician's testimony is to the effect that he was called a few minutes after plaintiff was burned; that there was a "burned spot on the right thigh in front extending about ten inches, almost surrounding the whole thigh, a third degree burn there;" that she had in front, on the left thigh, a second degree burn the size of a silver dollar; there was a similar burn on her abdomen; that a third degree burn means "that the burn is in the skin and in the subfascia;" that he treated the child from the day of the injury, May 22, 1931, until about February 12, 1932; that during the first two or three weeks the child was in severe pain; that she was in shock for a couple of days after the accident; that there was now scar tissue on the leg; it contains no pores; the doctor had been in general practice since 1919 and had treated many other cases of burn.

Dr. Adams, called by plaintiff, testified he was a physician and surgeon of 38 years practice in Chicago; that he examined plaintiff first on November 29, 1932, and the last time October 24, 1933, and found a third degree scar on the right side; the scar was nine and one-half inches long and part of it seven inches wide; that it nearly encircled the thigh; that a third degree scar means that the normal skin has been replaced with scar

tissue; that the scar is permanent; that such a burn retards development of the limb in circumference but not in length; that as time goes on the left thigh muscles will measure greater in circumference than the right; that in cold weather unless the scar tissue is well oiled it may chap and crack and blood frequently oozes from it; that the strength and usefulness of the leg is reduced.

This is substantially all the evidence as to the extent of plaintiff's injuries. There is no evidence to the contrary. No doctor or other witness was called by the defendant so that the testimony stands without contradiction. It is true that the child was in school and played around with other children.

Upon a consideration of all the evidence in the record we are unable to say that the judgment is so excessive as to warrant interference on our part.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.

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37657

JOHN DAHMKE,
Defendant in Error.

vs.

DAVID RUTTENBERG, HARRY FISHMAN
and LOUIS FISHMAN,
Plaintiffs in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

278 I.A. 623²

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

John Dahmke brought suit against David Ruttenberg, Harry Fishman and Louis Fishman to recover damages for personal injuries, claiming he had been shot and injured by defendant David Ruttenberg, who was in the employ of the Fishmans, and that Ruttenberg, at the time, was acting within the scope of his authority in shooting plaintiff. There was a jury trial and a verdict finding the defendants guilty and assessing plaintiff's damages at \$20,000. Afterward defendants' motion for a new trial was overruled and judgment entered on the verdict. An appeal was prayed and allowed but not perfected. The three defendants have sued out this writ of error.

The record discloses that defendants Harry and Louis Fishman were conducting the Fargo hotel in Chicago and employed defendant Ruttenberg, who did janitor and other work around the hotel. The Fishmans also employed a staff of employees which included a manager and a night clerk. Plaintiff had been a permanent resident of the hotel for some time, but on account of non-payment of his bill the door to his room was locked during two days he was absent from the hotel. When he returned to the hotel he was unable to enter his room, and shortly thereafter he met the manager of the hotel on the street in front of the hotel and they got into an argument. Ruttenberg heard the argument, took a revolver that he said was kept in the hotel, went out in front of the hotel where the argument was still in progress; plaintiff said something to him that angered him and

37827

DAVID BUTLER, Plaintiff,
vs.
JOHN J. BUTLER, Defendant.

IN SENATE, JANUARY 10, 1907.

OF THE COURT.

DAVID BUTLER, Plaintiff,
vs.
JOHN J. BUTLER, Defendant.

378 I.A. 623

IN SENATE, JANUARY 10, 1907.
OF THE COURT.

John Butler, plaintiff, and John Butler, defendant, were
 witnesses and John Butler is plaintiff in the present action.
 It is stated that he was injured by defendant's negligence,
 and was in the office of the defendant, and that defendant, at the
 time, was negligent in the conduct of his business in the
 plaintiff's office. There was a jury trial and a verdict for the plaintiff
 in the sum of \$100,000. The plaintiff's damages were \$100,000. Afterward
 defendant moved for a new trial and succeeded in obtaining it.
 On the verdict, the plaintiff was awarded and allowed but not paid.
 The three parties have and out of this trial of three.
 The present plaintiff and defendant were witnesses and John Butler
 were witnesses. The three parties in Chicago and Chicago defendant
 Butler, and the plaintiff and other parties were the only. The
 plaintiff also employed a staff of witnesses which included a number
 and a staff of witnesses. Plaintiff had been a permanent resident of the
 Hotel for some time, and on account of non-payment of his bill the
 door to his room was locked during two days he was absent from the
 Hotel. When he returned to his hotel he was unable to enter his room,
 and finally, after he was the manager of the hotel on the street
 in front of the hotel and they got into an argument. Butler
 heard an argument, took a revolver from his belt and went into the
 hotel, went out in front of the hotel where the argument was still
 in progress; plaintiff said that he saw that entered his and

shot plaintiff in the leg, fracturing the left femur just above the knee. Plaintiff was removed to a hospital where his leg was placed in a cast and so remained five or six weeks, and the evidence tends to show that as a result of the shot the leg was shortened about an inch.

Counsel for plaintiff in his brief says that "Under the declaration and the law it was necessary for the plaintiff to prove that the defendant Rutenberg was an agent of the appellants Harry Fishman and Louis Fishman, acting within the scope of his authority in what he did." We think this is a correct statement of the law and this seems to be conceded by counsel for defendants. But defendants argue that the verdict in favor of plaintiff, finding in effect that Rutenberg acted within the scope of his employment at the time he shot and wounded plaintiff, is contrary to all of the evidence.

Rutenberg, called as a witness for plaintiff, testified that defendants Harry and Louis Fishman were brothers and that Harry Fishman was his brother-in-law; that he was first employed by the Fishmans at the Fargo hotel in April, 1932, and worked until the date of the shooting, January 26, 1933; that when he was employed Louis Fishman told him to take full charge of the house; to do janitor work and repair work and to see that everything was kept in order; that about two weeks after he was employed he moved into the hotel; that Fishman told him that if there was anything "going on rough there I was to check them out or to quiet them down.*** He gave orders to the night clerk to call me down and to go and quiet them down;" that he did janitor work all the time he was employed at the hotel; had access to the office; that he had no access to the cabinets, office drawers, or other things in the office; that there was a loaded revolver kept in the telephone desk in the office; that at one time he went with Mr. Counts, the

manager of the hotel, took the gun out of the desk went upstairs with the manager to apartment 74, where there were three men, all of whom had guns; that he took the guns away from them, called the police and turned them over to the police; that once or twice he carried the gun and that the Fishmans knew of it; that on another occasion about three o'clock in the morning he used the gun; that "two fellows came in and started hitting the night clerk. *** I came out and had to use it to stop them." The witness further testified that he knew plaintiff and saw him in the lobby of the hotel about ten o'clock on the evening of January 26, 1933.

Plaintiff asked where the manager was, then walked out of the hotel and met the manager, Mr. Counts, at the doorway. The witness was then in the lobby; that he did not then have a gun; that plaintiff and the manager were arguing and that the manager accused witness of opening plaintiff's door and permitting plaintiff to take out some things belonging to him that were in the room. The witness denied this. Plaintiff said: "One of you is a liar," whereupon witness said, "Why don't you two get into the office and settle it up instead of arguing;" that they were quarreling, "so I thought there was going to be a riot, so I went to the desk and got the gun, and said, 'If you don't stop there will be some trouble.' Dahake said he don't care. Then I got excited and fired the gun at Mr. Dahake and hit him. I was standing inside the door in the lobby."

On cross-examination the witness testified that he had told Counts, the manager of the hotel, that plaintiff's room had been broken open; that shortly afterward plaintiff and Counts met outside the hotel door and were arguing on the sidewalk; "I asked them both to come in and talk it over. I saw the danger and I asked the manager of the hotel to step inside. *** The men were arguing on the sidewalk. They weren't fighting or wrestling. They were using

manager of the hotel, took me up to the room which was occupied by the three men, all of whom had guns; that he took the guns away from them, called the police and locked them up in the cell; that once or twice he carried the gun and that the witness saw it; that on another occasion about three o'clock in the morning he saw the man; that "the witness came in and started talking with the clerk, who came out and told him that the witness was there; the witness further testified that he knew the man and was with him in the lobby of the hotel about ten o'clock on the evening of January 21, 1935.

Witness testified that he saw the man, who was with him at the hotel and not the manager, at the lobby, on the hallway. The witness was then in the lobby; that he did not know where the man was; that the man was with the manager and that the manager started witness at seeing witness's gun and starting witness to take out some things belonging to him and were in the room. The witness testified that "one of you is a liar."

Witness testified that "they took you the gun into the office and return it to you without a receipt; that they were carrying, and I thought you were going to be a liar, so I went to the door and of the gun, and said, 'if you don't stop there will be some trouble.'"

Witness said a man's name. Then I got excited and fired the gun at Mr. Johnson and his son. I was standing inside the door in the lobby."

On cross-examination the witness testified that he had told Corbett, the manager of the hotel, that witness's room had been broken open; that witness afterwards testified that Corbett had not also the hotel door and were arguing on the hallway; "I asked them not to come in and that is over. I saw the danger and I asked the manager of the hotel to stop inside. The men were arguing on the hallway. They were talking or wrestling. They were using

a little profane language. They were mad - both of them." The witness then walked inside to the telephone desk and got the gun; he saw there was to be a big fight; that nobody told him to get the gun; that the witness was standing inside the door of the lobby of the hotel with the gun. "I told Mr. Dahmke to cut it out. He says something to me - I don't remember what he said, and it made me mad and I fired the gun at him. I don't recall that Mr. Dahmke accused me of locking him out. I told him to cut that out, that the people are sleeping;" that he never had been in a shooting scrape before.

Plaintiff testified that he resided in the Fargo hotel from March, 1932, until January 27, 1933; that two days previous to the time of the trouble he was visiting in Oak Park; that while he lived at the hotel he knew the three defendants, saw defendant Ruttenberg nearly every day and was well acquainted with him; that Ruttenberg was employed as houseman and did general repair work; that on one occasion the witness went with Ruttenberg when the latter fired a gun at a supposed marauder in the hotel; that he saw Ruttenberg on other occasions carry a gun but he saw no other incidents; that one of Ruttenberg's duties was to keep the tenants quiet in case they made a noise; in case the manager called him, Ruttenberg would go to the room and quiet them; that about ten o'clock in the evening of the day in question plaintiff moved across the street because he found his door locked at the Fargo hotel that afternoon about three o'clock; that witness learned about 10:30 or 11 o'clock that the manager of the Fargo wanted to see him, and he went to the Fargo hotel; he saw Ruttenberg and asked him where the manager, Counts, was and was told that Counts had gone across the street, so plaintiff went across the street and stood in the apartment house where he had moved; that soon he saw Counts and they had a discussion which lasted for about six or seven minutes; then they walked over to the Fargo hotel; that Ruttenberg was called out and the three stood for awhile

a little girl was standing. They were not - well, I don't know. The girl
 next to her was looking at the policeman and the girl was
 and there was a big thing; and there was a big thing
 him; and the policeman was at the door of the house of
 the hotel and the girl. I don't know, I don't know, I don't know. I don't know
 something to me - I don't know, I don't know, I don't know. I don't know
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 time of the evening, I don't know, I don't know, I don't know. I don't know, I don't know
 at the hotel, I don't know, I don't know, I don't know. I don't know, I don't know
 nearly every day, I don't know, I don't know, I don't know. I don't know, I don't know
 was employed as a policeman and his general reputation; I don't know, I don't know
 occasion, I don't know, I don't know, I don't know. I don't know, I don't know
 gun to a policeman, I don't know, I don't know, I don't know. I don't know, I don't know
 other policeman, I don't know, I don't know, I don't know. I don't know, I don't know
 of the policeman's father, I don't know, I don't know, I don't know. I don't know, I don't know
 made a noise; I don't know, I don't know, I don't know. I don't know, I don't know
 to the policeman, I don't know, I don't know, I don't know. I don't know, I don't know
 of the day, I don't know, I don't know, I don't know. I don't know, I don't know
 found his way to the hotel, I don't know, I don't know, I don't know. I don't know, I don't know
 o'clock; I don't know, I don't know, I don't know. I don't know, I don't know
 murder of the girl, I don't know, I don't know, I don't know. I don't know, I don't know
 hotel; I don't know, I don't know, I don't know. I don't know, I don't know
 and was told that the girl was across the street, I don't know, I don't know
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 for about the seven minutes; then they walked over to the hotel
 hotel; I don't know, I don't know, I don't know. I don't know, I don't know

talking about whether his room had been broken into or whether plaintiff had been let into the room by Rutenberg; that during the argument plaintiff said, "Which one of you are lying?" And Dave said something, and I said I was talking to Mr. Counts about that and turned around to Mr. Counts, and the shot went off. *** David Rutenberg shot me." When Rutenberg shot he was standing inside the door and came out and was swearing "and wanted to shoot again, and Mr. Counts took his arm and tried to quiet him down, and I said, 'Dave, you have shot me.'"

Counts, the manager, testified that shortly before the shot he and plaintiff got into an argument outside the door on the ground; that it was stated that plaintiff had broken into his room at the hotel; that he told plaintiff he was going to have him arrested for breaking into the apartment; that they quarreled; that Rutenberg was behind the door and said, "Don't get excited, Dahmke," and shot him."

This is substantially all the evidence as to how the shooting occurred. There is other evidence in the record but in view of the fact that we have decided the judgment cannot stand, we think it unnecessary to refer to it further.

We think it clear from a consideration of the evidence, which we have above set forth, as to what occurred just prior to the shooting, that Rutenberg was not acting within the scope of his authority when he shot plaintiff. Ulrich v. Knickerbocker Ice Co., 191 Ill.App. 337; Haynie, Adm'x v. Ill. Cent. R. R. Co., 194 Ill. App. 113. It certainly was no part of defendant Rutenberg's duty to shoot plaintiff. Plaintiff and Counts, the manager, were quarreling; there were no weapons; they were not fighting or wrestling, and in no view of the case can it be said that Rutenberg was acting within the scope of his authority. The court should have sustained defendants

Fishmans' motion for a directed verdict at the close of the case.

The judgment of the Superior court of Cook county as to defendants Harry Fishman and Louis Fishman is reversed, but the judgment against defendant David Euttenberg will not be disturbed.

Sec. 92, Civil Practice Act, Rule 1, Supreme Court.

JUDGMENT REVERSED AS TO HARRY
FISHMAN and LOUIS FISHMAN.

McSurely and Hatchett, JJ., concur.

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37492

CATHERINE SCHULTZ,
Plaintiff in Error;

vs.

THE LIVE STOCK NATIONAL BANK OF
CHICAGO, Administrator of the
Estate of MAX GRABO, Deceased,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

278 I.A. 623³

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff was a guest riding in an automobile which collided with another automobile driven by Max Grabo, hereafter called defendant; she brought suit to recover compensation for alleged injuries, and upon trial by a jury suffered an adverse judgment; she seeks a reversal.

The testimony on plaintiff's behalf tended to show that on December 27, 1931, about five o'clock p. m., she was riding as a passenger-guest in the rear seat of a car driven by Fred Brei going west on Dempster street; as it approached Waukegan Road, an intersecting street which runs north, the Dempster street lights showed green and Brei continued crossing Waukegan Road; when he was almost across Waukegan Road the car of defendant, which was going eastward on Dempster, turned suddenly to the left, northward on Waukegan Road, directly in the pathway of Brei's car, and in the collision plaintiff was injured.

Defendant says that as he came from the west on Dempster to Waukegan Road the traffic lights were red; that he stopped his car and waited for the lights to change; that when they changed he drove eastward for about ten feet and then turned to the north in Waukegan Road; that Brei's car was then about 300 feet away; that defendant's car was standing when Brei's car collided with it.

Plaintiff argues that the verdict of the jury was caused by instructions given at the request of the defendant which are

25432

EXHIBIT 10

1. Exhibit 10

25.

THE FIVE THIRTY EIGHT
CHILMAN, DUBLIN, IRELAND
STATE OF NEW YORK
Dated at New York
October 10, 1934.

25432 I.A. 623

ALL TESTIMONY SUBMITTED HEREIN IS IN WRITING.

Plaintiff's Exhibit 10 is a photograph of a car which was
with another automobile driven by Mrs. John, Plaintiff's Exhibit 10
Tentative; and it is also a photograph of the car which was
taken, and which was by a lady who is a relative of Plaintiff; and
which is a photograph.

The photograph of Plaintiff's Exhibit 10 is a photograph of a car which was
December 27, 1931, which was a car of a car which was
passenger-car which is a car which was driven by Mrs. John, Plaintiff's Exhibit 10
west on Lexington Road; and it is a photograph of a car which was
setting street which was west, the passenger car which was
green and red and which was driving westward; and it is a photograph
Road
across Waukegan Road, which was a car of a car which was
Davenport, which was a car of a car which was
directly in the path of Mrs. John's car, and in the collision which
it was injured.

Plaintiff's Exhibit 10 is a photograph of a car which was
to Waukegan Road and which was a car which was
car and which was in the path of Mrs. John's car, and which was
across the road for about ten feet and then turned to the north in
Waukegan Road; and Mrs. John's car was about ten feet away; and
Defendant's car was standing when Mrs. John's car arrived with it.

Plaintiff's Exhibit 10 is a photograph of a car which was
by the testimony given at the hearing of the testimony which was

prejudicial. The first of these is as follows:

"The court instructs you as to the first count of the declaration that if you believe from the evidence under the instructions of the court that the driver of the automobile in question at the time of the collision and immediately prior thereto omitted to do anything for the safety of Catherine Schultz, who was riding in his automobile, which an ordinarily careful, cautious, prudent and observant person under like circumstances, as shown by the evidence, would have done, and if you further believe from the evidence under the instructions of the court that Catherine Schultz, by the exercise of ordinary care, caution, prudence and diligence could and would have supplied the omission of the driver and would thereby have prevented the collision in question, then you are instructed that the plaintiff can not recover in this case, and your verdict should be for the defendant." (Italics ours.)

The most that is required of a passenger-guest, under the circumstances, is the exercise of ordinary care for his own safety. The negligence of the driver cannot be imputed to him, but he is responsible for his own negligence. Opp v. Pryor, 294 Ill. 538. A passenger riding as an invited guest in an automobile is bound to exercise only such care as the exigencies of the situation require. As was said in St. Clair Nat'l Bank v. Monaghan, 256 Ill. App. 471, if a guest were required at street intersections to look out and warn the driver of approaching cars, "a most uncomfortable and hazardous position might be created for the driver of a car who happened to have several passengers as guests." If all the passenger-guests should constantly be warning and directing the driver how to proceed he would be so distracted as to be unable to drive the car carefully. Back seat driving should not be encouraged.

The questioned instruction, imposing upon the passenger the duty of supplying any omission of the driver, virtually told the jury that the passenger guaranteed that the driver would be free from any negligent omission of his duty. The instruction went far beyond the required duties of a passenger. It was peremptory, and should have been refused.

The next instruction complained of is as follows:

"The court instructs you as to the first count of the declaration that if a passenger in an automobile sees that the automobile in

which he is riding is about to be struck or collide with another automobile, it is the duty of said passenger to warn the driver of the automobile in which he is riding of said danger, and in this case, if you believe from the evidence, under the instructions of the court, that the plaintiff while riding as a passenger in an automobile saw the automobile of the defendant approaching in time to have warned the driver of the car in which she was then riding of the approach of the said automobile and of said danger, and to have avoided said collision, it was her duty to have given the driver of said car said warning and her failure to do so constitutes contributory negligence on her part, and if you believe that the plaintiff was guilty of said contributory negligence from the evidence, under the instructions of the court, your verdict should be for the defendant."

This instruction undertook to tell the jury what conduct on the part of plaintiff amounted to contributory negligence. It in effect told the jury that it was the duty of a passenger to so act as to avoid a collision with another automobile, and, in effect, imputes the negligence of the driver to the plaintiff. The only time that a passenger would be required to give a warning would be when he saw some danger which the driver did not see. If the driver sees an approaching automobile, and is watching it, then no warning is necessary. The questioned instruction told the jury that a failure of the passenger to warn, under any and all circumstances, constitutes contributory negligence. The question whether or not the guest is guilty of contributory negligence is one of fact for the jury. Nonn v. Chicago City Ry. Co., 232 Ill. 378.

Counsel for defendant argues that because certain other given instructions correctly stated the rule on contributory negligence, the errors in the instructions complained of were cured. Peremptory instructions, which are erroneous, are not cured by other given instructions.

Defendant says that the record fails to show that plaintiff was injured to the extent claimed, but the weight of the evidence has not been considered by us.

For the reasons indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and Hatchett, J., concur.

37565

ILLINOIS BRICK COMPANY,
a Corporation,

Appellee,

vs.

PENNSYLVANIA RAILROAD COMPANY,
a Corporation,

Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

278 I.A. 623⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

I. Defendant Railroad company was allowed an appeal to the Supreme court from a judgment entered against it in the Circuit court of Cook county upon the finding of the court for the sum of \$42,428.09, plus costs and attorneys' fees allowed in the sum of \$2,000. The appeal was taken to the Supreme court upon the theory that questions of constitutional law were involved, and the briefs filed were largely devoted to a discussion of those questions. The Supreme court, however, (without filing an opinion) entered an order transferring the appeal to this court, thus eliminating, as we understand, these constitutional questions.

Defendant is a common carrier. The basis of the suit brought by plaintiff is an order entered by the Illinois Commerce commission on April 16, 1924, which incorporated therein a previous order of that commission entered on November 7, 1923. This order awarded reparation to plaintiff on account of freights paid by it upon shipments of brick made from Bernice, Illinois, to certain points within the Chicago switching district between October 28, 1920, and February 15, 1922. As to shipments made prior to that time, namely, between March 1, 1920, and October 28, 1920, the commission found that the complaints of the Brick company had not been filed within the time required by statute, and that reparation for these shipments was barred.

Statements were filed with the Illinois Commerce Commission on December 31, 1923, showing excess charges collected by the Pitts-

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Pittsburgh, Cincinnati, Chicago & St. Louis Railroad company (then co-defendant, afterward dismissed out of the case) in the sum of \$7,095.82, and similar excess charges collected by the Pennsylvania railroad in the sum of \$21,869.90. The order of April 16, 1924, incorporating the order of November 7, 1923, recited the reservation of jurisdiction for the purpose of awarding reparation for charges collected in excess of rates found to be just and reasonable and ordered that defendants be authorized and directed to pay the amount of reparation so found to be due plaintiff on or before May 1, 1924, with interest at the legal rate. The railroads did not pay.

Thereafter, on December 31, 1924, March 3, 1925, and April 13, 1925, plaintiff filed three suits, one in assumpsit, one in tort and one in debt. In each case the order of the Illinois Commerce commission of April 16, 1924, was set up verbatim. It was averred that the rates collected by defendant were unreasonable, discriminatory and unduly preferential and prejudicial, and in violation of sections 32 and 38 of the Public Utility act (Smith-Hurd's Ill. Rev. Stats., 1933, chap. 111 2/3, secs. 32 and 38), and that plaintiff was entitled to recover the amount of the order with attorneys' fees pursuant to section 72 of chapter 111 2/3 of the statutes (Smith-Hurd's Ill. Rev. Stats. 1933, chap. 111 2/3, sec. 72, par. 76).

Upon the trial plaintiff offered in evidence a certified copy of the complete record before the Illinois Commerce Commission; also evidence showing that in 1922 the Pennsylvania Railroad company leased the Pittsburgh, etc. company for 999 years. Plaintiff also offered a certified copy of the order of the Interstate Commerce commission dated July 10, 1922, approving this lease, effective as of January 1, 1921. Defendant offered in evidence a certified copy of an order of the Illinois Commerce commission dated

August 10, 1920, docket 10620, to which was attached a copy of the report of the Interstate Commerce commission, dated July 29, 1920, in Ex Parte 74, also a certified copy of the order of the Interstate Commerce commission entered January 11, 1921, docket 11703, re: Intrastate rates in Illinois. Evidence was also offered by plaintiff with reference to attorneys' fees.

At the conclusion of the trial plaintiff dismissed as to the Pittsburgh, etc. company, and the court deducted from the sum of \$28,965.72, mentioned in the order of the commission, the sum of \$292.70, being the amount of supposed excess charges of the Pittsburgh company made between October 28, 1920, and January 1, 1921, the date upon which the lease to the Pennsylvania Railroad company became effective. There was a finding for the amount of reparation due from both defendants against the Pennsylvania company with interest at 5 per cent from May 1, 1924, making a total finding of \$42,423.09, plus \$2000 costs allowed as attorneys' fees. There was a motion by the Pennsylvania company in arrest of judgment, which was overruled, and judgment was entered.

II. Plaintiff is a manufacturer and shipper of common brick; its place of business is at Bernice, Illinois, which is about two miles southeast of an irregular area known as the Chicago switching district. While Bernice is not actually within this district, it is so close to it that plaintiff's product is in direct competition with plants located within the district. At the times for which reparation was allowed defendants charged rates of 93½ cents, 94½ cents and 95 cents per ton on common brick shipped from Bernice to points within the switching district. All these shipments were purely intrastate. At the same time the intrastate rate within the district charged plaintiff's competitors for the same product

At the conclusion of the trial, the jury returned a verdict of guilty, and the court sentenced the defendant to the State Prison for a term of 10 years. The defendant was committed to the custody of the State Prison, and the court adjourned.

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was 50 cents per ton.

The rates charged came into existence as follows: In August, 1911, the Lowrey tariff, so-called, Illinois Public Utilities Commission 39 (carrier-made) was adopted by the shippers and carriers in the Chicago district. It fixed a rate of 30 cents per ton on all commodities for shipments between points located within the switching district. Common brick, because it was a cheap, low grade commodity, was given a lower rate of 25 cents per ton for a single-line haul. Bernice and some other points were so close to the switching district and so directly in competition with plants located within it that a 25 cent rate for common brick was fixed for shipments which originated at these points destined to locations within the switching district for a single-line haul. By the Lowrey tariff Bernice was put on a parity with points of origin within the district. This 25 cent rate continued until June 25, 1918, when general order No. 28 issued by the director general of traffic as a war measure took effect. The purpose of that order was to secure additional revenue for the railroads. It increased railroad freight rates throughout the whole country by 25 per cent, with certain exceptions where flat increases were made. One of these exceptions was common brick via single-line hauls, and on this commodity a flat increase of 2 cents per hundred pounds, or 40 cents a ton, was added to the former rates. The two-line rate on brick within the district was under the Lowrey tariff carried as general commodities. Thus the two-line rate was advanced only 25 per cent, making it 40 cents per ton, while as a result of this order the new one-line rate was made 70 cents per ton. The result was so clearly unfair that the director general issued Freight Rate Authority 1887, effective October 18, 1918. This order substituted within the Chicago switching district a 25 per cent increase on common brick for the ^{flat} 40 cents per ton increase which had been fixed by

The Department of Production.

general order No. 28. By inadvertence, apparently, ^{no} substitution was made as to rates on common brick from Bernice and other like competitive points which were outside the switching district. The result was that within the district the rate for common brick became 30 cents per ton, while from Bernice for the same commodity it was 70 cents per ton.

Plaintiff and shippers similarly situated filed a complaint with the Interstate Commerce commission. The case is known as docket 11317 and was decided October 27, 1921. This was, however, after the determination of the jurisdiction of the Interstate Commerce commission over intrastate rates. Under the provisions of the transportation act of 1920 that jurisdiction ceased September 1, 1920. The report of the Interstate commission said: "We are asked to award reparation and to establish reasonable and non-prejudicial rates for the future. Except under circumstances not here present, our jurisdiction over intrastate rates is limited to the period of federal control." In both the report and the order which was entered pursuant to it, the commission was careful to limit its findings to interstate rates. Apparently, it was wholly without jurisdiction to pass on intrastate rates and expressly disclaimed any intention of doing so. The report of the commission, however, found that the rate of 70 cents per ton from Bernice to interstate destinations within the Chicago switching district was not unreasonably but unjustly discriminatory to the extent that it exceeded by more than 10 cents per ton contemporaneous rates applicable to interstate shipments between points wholly within the switching district. It ordered the carriers to remove such discriminations not later than February 16, 1922.

While this proceeding was pending before the Interstate Commerce commission, that commission held a general rate investigation known as Ex Parte 74, 58 I. C. C. 220. As a result of that investi-

General Order No. 101, of the Bureau, dated January 10, 1900, was made as to not a commission order from the Bureau and a similar competitive order was made as to the Bureau. The result was that the Bureau for the time for General Order No. 101 was made as to, while the Bureau for the time for General Order No. 101 was made as to.

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gation the Interstate Commerce commission authorized the railroads to increase freight rates in general by various percentages which ranged from 25 to 40 per cent. This order was limited solely to interstate rates and did not undertake to apply any specific rates to any specific commodities. In fact it recited that to prevent injustice necessary adjustments would have to be made.

Thereafter, the Illinois Commerce commission in a proceeding known as docket 10620 authorized an increase in the general level of intrastate rates in order to make the same conform to Ex Parte 74. This order was entered August 10, 1920, and authorized an increase in the general level of intrastate rates in Illinois by 33 1/3 per cent, afterward changed by supplemental order to 35 per cent. Here also the commission did not give consideration to specific rates. The Interstate Commerce commission in Ex Parte 74, having authorized a general increase of 40 per cent in interstate rates in certain parts of Illinois, a complaint was made to that commission that that the increase of 33 1/3 per cent and 35 per cent by the Illinois commission on intrastate rates were not sufficient. That complaint is known as docket 11703, and by a decision made January 11, 1921, the Interstate commission required the substitution of a 40 per cent increase in the general level of intrastate rates in Illinois. This was supplementary to docket 10620. Here again specific or particular rates were not considered by the commission. The result of the 35 1/3 per cent increase in the general level of rates was to increase the rate on common brick from Bernice to the switching district from 70 to 93½ cents per ton. As a result of the substitution of a 35 per cent increase for the 33 1/3 per cent increase the same rates were increased to 94½ cents per ton, and as a result of the order entered in docket 11703, the rate was increased to 98 cents per ton. On the other hand, as a result of the order of the Interstate Commerce commission in docket 11317, defendant and other railroads reduced the

rates on brick from Bernice and other like points from 98 cents to 50 cents per ton. At this time the rates on brick within the district were from 40 to 42 cents per ton. The railroads at the same time increased these rates to 50 cents, again putting the Bernice rates on a parity within the switching district. The order in docket 11317 authorized defendant to charge 10 cents per ton more on common brick from Bernice than they charged on brick within the Chicago switching district. Defendant, however, did not take advantage of this privilege but voluntarily restored the parity which had existed during the period of August, 1911, to June 25, 1913.

III. Defendant questions the right and power of the Illinois Commerce commission to award reparation, because it says that the rates collected by it had been theretofore established by the Interstate Commerce Commission and in part by the Illinois Commerce Commission; that these rates were therefore lawful when collected and ^{not} could be retroactively questioned before the commission, whether acting in a quasi-legislative or quasi-judicial capacity. Defendant relies on Arizona Grocery Co. v. A. T. & S. F. Ry. Co., 284 U. S. 370, 76 L. Ed. 348, which it undertakes to distinguish from Eagle Cotton Oil Co. v. Southern Ry. Co., 51 Fed. (2d) 443, in which certiorari was denied by the Supreme court of the United States in 284 U. S. 675. The ground of the supposed distinction upon which defendant insists, is that in the Eagle Cotton Oil Co. case the original rate fixed by the commission had expired by limitation and that the new rate ~~was~~ attacked was therefore a "carrier-made" rate.

At the same term in which the opinion was filed in the Arizona Grocery Co. case, the Supreme court denied certiorari in the Eagle Cotton Oil Co. case. It is apparent that case received consideration by the United States Supreme court. Two Justices dissenting stated that their reasons for so doing were given by the Circuit court of Appeals in a concurring opinion in the Eagle Cotton Oil Co.

case. This concurring opinion by Judge Hutchison states: "Neither specific approval by the Commission of a general schedule of rates, nor the specific promulgation of a particular rate, prevents the Commission from granting reparation as to that rate, if, upon complaint, it is advised that reparation should be made." The majority opinion was to the effect that where the Commission was dealing with the whole body of rates throughout the country and was looking at the general level of all rates, and the propriety of particular rates, to which a complainant was a party, was not the subject matter of particular investigation or consideration, it could not be held that the particular rate had been fixed or prescribed by the Commission, or that a claim for reparation would be rejected for that reason. The majority opinion relied on Brimstone R. & Canal Co. v. United States, 276 U. S. 104, 48 S. Ct. 282, 72 L. Ed. 487.

In the Arizona Grocery Co. case the United States Supreme court affirmed a judgment of the Circuit Court of Appeals of the 9th circuit entered in the same case. See 49 Fed. (2d) 563. The facts are stated at greater length in the Federal report. It appeared that the Grocery company brought suit against several carriers in the District court upon an order of the Interstate Commerce commission providing for reparation, 140 I.C.C. 171. The proceeding found that the rates charged from points in northern California and in southern California upon shipments of sugar to Phoenix, Arizona, were unreasonable and unjust and reparations were awarded. The answers of the railroads were to the effect that in prior proceedings rates to a maximum amount had been fixed by the commission and had been declared to be just and reasonable. Plaintiffs contended that the fixing of a maximum rate was not the fixing of a just and reasonable rate, but that, on the contrary, it was, nevertheless, the duty of the carrier to fix a rate which was just and reasonable, not exceeding the maximum rate fixed by the commission. In the Supreme court the judgment

was reversed. The opinion stated that the case "turns upon the power of the Interstate Commerce commission to award reparations with respect to shipments which moved under rates approved or prescribed by it." It was held the commission did not have such power. The opinion states:

"But it is also to be observed that so long as the Act continues in its present form, the great mass of rates will be carrier-made rates, as to which the Commission need take no action except of its own volition or upon complaint, and may in such cases award reparation by reason of the surcharges made to shippers under the theretofore existing rate.

Where the Commission has, upon complaint and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to reasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate."

As we understand the law, the rate fixed becomes legal only in cases where the Commission has upon complaint and after hearing declared what is the maximum reasonable rate which the carrier may charge. In such case the commission may not thereafter grant reparation on account of the collection of the rate which it itself fixed, acting in its legislative capacity. As to other or carrier-made rates reparation may be awarded.

We do not understand that there is any conflict between the majority opinions in the Eagle Cotton Oil Co. case and the Arizona Grocery Co. case. We think the rule announced in the Arizona Grocery Co. case applicable in the construction of section 72 of the Illinois Public Utility act. We conclude from the history of the rates collected by defendant as hereinbefore set forth, that the same were essentially carrier-made rates, and hold that plaintiff is not precluded from recovering reparation by any prior order of the Illinois commission or of the Interstate Commerce commission. We think it fair to assume that the order of the Supreme court transferring this appeal to this court indicates that such was its opinion. Moreover,

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not possible to find any other documents of this kind.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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Page 1 of 1

Abstract: The purpose of this study was to determine the effect of a 12-week training program on the physical fitness and health of sedentary, middle-aged men. The subjects were 20 men, aged 40-50, who were sedentary and had no known health problems. They were divided into two groups: a control group and a training group. The control group remained sedentary, while the training group participated in a 12-week program of aerobic and resistance training. The program consisted of three sessions per week, each lasting 45 minutes. The aerobic sessions were performed on a treadmill at 60% of the maximum heart rate, and the resistance sessions were performed using free weights. The subjects were assessed at the beginning and end of the program using a variety of physical fitness tests, including a 1.5-mile run, a 10-minute step test, and a handgrip strength test. The results of the study showed that the training group had significantly improved their physical fitness and health compared to the control group. The training group had a significantly lower heart rate, a significantly higher maximum heart rate, and a significantly higher handgrip strength. The training group also had a significantly lower body mass index (BMI) and a significantly lower percentage of body fat. The control group had no significant changes in any of these measures. The results of this study suggest that a 12-week training program can improve the physical fitness and health of sedentary, middle-aged men.

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under circumstances somewhat similar to those which appear here, it was held in Terminal R.R. Assoc. v. Public Utilities Comm., 304 Ill. 312, that the Illinois commission was not precluded from awarding reparation.

There is no doubt that the Interstate Commerce commission, upon a petition showing discrimination against interstate commerce resulting from a disparity of intrastate and interstate rates, has jurisdiction to enter an order restoring the parity; (U.S. v. Louisiana, 290 U.S. 70; Florida v. U.S., 292 U.S. 1; Illinois Commerce Comm. v. U.S., 292 U.S. 783) but there is no issue of that kind here. In case of such unjust discrimination, the proper practice is for the Illinois commission to take jurisdiction of intrastate rates and make such order as to it may seem just. The order is then subject to review in proper proceedings by the Interstate commission, but it is not reviewable by the court of Illinois except for want of jurisdiction, for violation of constitutional provisions, or because it does not rest on any substantial foundation in the evidence. A.T.A. S.F. Ry. Co. v. Commerce Comm., 335 Ill. 70.

IV. Defendant also contends that the findings of the order of the Illinois Commerce Commission of April 16, 1924, and evidence on which the findings are based, are not sufficient to support the judgment. Plaintiff contends that the order of November 7, 1923, finding the rates attacked unreasonable and unjustly discriminatory was an appellate order and that defendant having failed to appeal from it is now precluded from litigating the question of the sufficiency of the evidence in that respect. This contention requires a construction of section 68 of the Public Utilities act (Smith-Hurd's Ill. Rev. Stat. 1933, chap. 111 2/3, sec. 68) which provides that failure to appeal from certain orders shall waive the right to have the orders reviewed on the merits by any court. The theory of plaintiff seems to be that the decision as to whether the rates were discriminatory or unreasonable as found by the Illinois commission in the order entered November 7, 1923, was made by the commission in the exercise of its administrative or legislative function as distinguished from its quasi-judicial function, and it is said that orders thus made in exercise of its legislative power by the commission are conclusive whether they relate to past or present rates

under circumstances which would be in accordance with the law, and that the Commission was not authorized to make such a finding.

There is no doubt that the Commission was authorized to make such a finding.

When a finding of fact is made by the Commission, it is a finding of fact, and it is not a finding of law. The Commission is not a court, and it is not a jury. It is a body of men and women who are chosen by the people to make a finding of fact.

It is the duty of the Commission to make a finding of fact, and it is not its duty to make a finding of law.

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The federal decision construing similar provisions of the Interstate Commerce act seem to so hold. Mitchell Coal & Coke Co. v. Penn. R.R. Co., 230 U.S. 247; Standard Oil Co. v. U.S., 283 U.S. 235; Glens Falls Portland Cement Co. v. Delaware & Hudson Co., 66 Fed. (2nd) 490. There are expressions to like effect in some Illinois decisions. Campbell v. Commerce Comm., 334 Ill. 293; Indiana Harbor Belt R.R. Co. v. Commerce Comm., 340 Ill. 304.

Plaintiff concedes that the order of award entered April 16, 1924, was not an appealable order. Terminal R.R. Ass'n v. Utilities Comm., 304 Ill. 312. In entering that order the Illinois Commission acted in a semi-judicial capacity, and such orders are not final and appealable. However, the order of November 23, 1923, definitely and finally determined the just and reasonable rate, past and future, for the shipment of common brick from Bernice, Illinois, to points within the Chicago switching district. The order of the Illinois Commission of that date was legislative in character and, we hold, final and appealable. Defendant did not appeal and is therefore precluded under section 68 from contesting that order on the merits. No case precisely in point has been cited, but we hold this to be the reasonable construction of the statute. Nevertheless, we have examined the evidence and think it sufficient to sustain the findings, and we have examined the findings and hold the same sufficient to justify the order for reparation.

Plaintiff, however, further contends that defendant is also precluded by its failure to appeal from arguing the sufficiency of the evidence to sustain the order where, as here, suit is brought under the provisions of section 72.

Defendant does not deny that the rule under federal decisions is as plaintiff contends, but says that a contrary rule has been announced by the Supreme court of Illinois in Commerce Comm. v. C.C.C. & S.L. Ry. Co., 320 Ill. 214; Moline Consumers Co. v. Ill. Commerce Comm., 353 Ill. 119; Louisville & Nashville R.R. Co. v. Commerce Comm., 353 Ill. 375, and relying on these cases defendant says, "Federal cases can have no authority on this point." In all the Illinois cases cited, the order of the commission was before the court by reason of a direct appeal taken by the party complaining as provided for in section 68 of the act, and in no one of them, as it seems to us, was the question here raised submitted to the court. We think it was not the intention of the Supreme court of Illinois in these cases to lay down a rule conflicting with that obtaining in federal jurisdic-

tions. It has been held in many cases that the Public Utility act of Illinois is in essence similar to the Interstate Commerce act, and that federal decisions under the Federal act are most persuasive in the construction of the State utility law. Public Utilities Comm. v. Terminal Railway Assoc., 291 Ill. 181; Terminal R. R. Assoc. v. Public Utilities Comm., 304 Ill. 312. We hold the findings of the Illinois commission were sufficient.

The findings as to the unreasonableness and discriminatory character of the rates are to the effect that it is clear from a cost study that the rate of 50 cents per ton provides adequate revenue for the transportation of brick from Bernice, Illinois; that it appears that on November 7, 1923, the commission entered its report, findings and order, which are "made a part hereof," under which the commission reserved jurisdiction of the subject matter and of the parties for the purpose of entering an order awarding reparation for charges collected in excess of the rates found to be just and reasonable in said order. The order recites: "We accordingly find that the complainant is entitled to an award of reparation in the amount of \$28,965.72 and interest at the legal rate from the date of payment for excessive freight charges collected ***." There is a further finding to the effect that to the extent that the rates complained of exceed by more than 10 cents per ton the rates contemporaneously applied between points within the switching district were unjustly discriminatory; that complainant has been damaged to the extent that the charges assessed are greater than the charges that would have been assessed had the said charges been predicated at the rate of 50 cents per ton, minimum 60,000 pounds per car. The order for reparation directs the time within which it must be paid and the amount of it. It was unnecessary that the order should make specific findings as to the evidence before the commission. Mitchell Coal & Coke Co. v. Penn. R. R. Co., 230 U. S. 247, 33 Sup. Ct. Rep. 916,

57 L. Ed. 1472; Mills v. Lehigh Valley R. R. Co., 238 U. S. 473; Glens Falls Portland Cement Co. v. Delaware & Hudson Co., 56 Fed. (2nd) 490, 54 Sup. Ct. Rep. 132. The statute does not require a statement of the evidential or primary facts. It is not concerned with mere forms of expression. The finding of the ultimate facts is enough to give the order of the Commission the effect of prima facie evidence. The findings are sufficient under the rule stated by the Supreme court of the United States, and we think the rule of the Illinois Supreme court is not otherwise. Chicago & Eastern Illinois Ry. Co. v. Commerce Comm., 341 Ill. 277.

Defendant cites Commerce Comm. v. C. C. C. & St. L. Ry. Co., 320 Ill. 214; L. & N. R. R. Co. v. Commerce Comm., 353 Ill. 375. However, in each of these cases the attack upon the order of the Commission was direct by proceedings in the nature of an appeal under the statute. We have already pointed out the similarity between the Interstate Commerce Commission act and the Public Utilities act of Illinois, making decisions of the Federal courts persuasive. We hold the findings of the order as to discrimination and unreasonableness in the rates collected sufficient. The damage sustained by plaintiff was a mere matter of computation and the finding in that respect is also sufficient.

V. It is also urged that the court erred in allowing plaintiff to introduce in evidence certain exhibits, A and B. Exhibit A tended to show that by the terms of the lease made with the approval of the Interstate Commerce commission and effective July 10, 1922, defendant Pittsburgh, Cincinnati, Chicago & St. Louis R. R. Co. had leased all its property to defendant Pennsylvania Railroad Co. for a term of 999 years, beginning as of January 1, 1921. Exhibit B was a certified copy of a report and order of the Interstate Commerce commission entered October 2, 1933, in docket No. 1466, covering this acquisition as of that date upon authorization of the commission.

This evidence tended to show the liability of defendant for reparation on shipments made from January 1, 1921, to February 15, 1922. The order of the Illinois Commerce commission in fact finds that the Pittsburgh railroad company is "now Pennsylvania Railroad company." It is urged that this evidence was inadmissible. There are innumerable authorities to the contrary. Terminal R.R. Assoc. v. Utilities Comm., 304 Ill. 312; Cleveland, C. C. & St. L. Ry. Co. v. Blair, 59 Fed. (2nd) 478; Vicksburg, S. & P. Ry. Co. v. Anderson-Tully Co., 261 Fed. 741, affirmed 255 U. S. 408; Atlantic Coast Line R. Co. v. Smith Bros., 63 Fed. (2nd) 747, certiorari denied 77 L. Ed. 1504.

The liability of the Pennsylvania company having been thus established, plaintiff elected to dismiss as to the other defendant, and so far as the record discloses this was done without any objection on the part of defendant. It would seem that under section 39 of chapter 110 of the former Practice act, this was proper (Teich v. Ayer, 213 Ill. App. 41), and defendant failing to object on the ground of variance, the objection was waived. (Mayer v. Branninger, 180 Ill. 110.) Moreover, the technical rules of the common law are not applicable to proceedings of this character, which the cases above cited show. The policy of this State has been definitely declared to be against the enforcement of the technicalities of pleading as known to the common law by the enactment of the Civil Practice act, effective January 1, 1934.

It is also urged by defendant that the petition for reparation was barred by the limitation of ^{one year} ~~two years~~ under the provisions of section 72 for the filing of a suit based on the award. The record shows, as already stated, that the first of the three suits, which were afterward consolidated, was begun December 31, 1924, the second, March 3, 1925, and the other April 13, 1925. The final order for reparation was filed by the Illinois Commerce commission

April 16, 1924. We understand that the limitation statute would not begin to run before the entry of that order. Any other construction of the statute would be most unreasonable, as the delay between the entry of the interlocutory order on November 7, 1923, and the entry of the final order based on it was largely occasioned by the failure of the defendant carrier to file the schedule of shipments as required by the order. The contention is therefore utterly without merit.

Neither is there merit to the further contention that the evidence fails to sustain the allowance of an attorney's fee of \$2000. The evidence offered in behalf of the plaintiff was to the effect that the services rendered were unusual and extraordinary, and there was no evidence offered by defendant tending to show the allowance to be unreasonable. The record is before us, and we are therefore not entirely without information as to the amount of work required and the value of the services. The defenses relied upon are technicalities. As to the merits of the controversy there is no doubt.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

37591

ARTHUR F. KOESTNER by IRENE McLAUGHLIN,
His Next Friend,

Appellant,

vs.

CITY OF CHICAGO, a Municipal Corporation,
EDWARD J. KELLY, as Mayor of the City of
Chicago, HERMAN M. BUNDSON, as Commissioner
of Health of the City of Chicago, JAMES P.
ALLMAN, as Commissioner of Police of the
City of Chicago, and CAPTAIN HEDRICK
McCAULEY, as Poundmaster of the City of
Chicago.

- and by order of Court -

THE UNIVERSITY OF CHICAGO, THE UNIVERSITY
OF ILLINOIS, NORTHWESTERN UNIVERSITY, LOYOLA
UNIVERSITY, CHICAGO MEDICAL SCHOOL and
MICHAEL REESE HOSPITAL,

Appellees.

APPEAL FROM
SUPERIOR COURT
OF COOK COUNTY.

278 I.A. 624¹

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by complainant from an order entered January 26, 1934, denying his motion to strike the pleas of defendants and allowing the counter-motions of defendants to sustain the pleas and dismiss the bill of complaint.

The bill was filed July 12, 1933, by Arthur F. Koestner, an infant, by Irene McLaughlin, his next friend and patroness donor of a dog of which Arthur is the owner. William Harrison Ennis, citizen and taxpayer of Chicago, in behalf of himself and other persons similarly situated, joined in the complaint. Defendants to the bill are the City of Chicago, Mayor Kelly, Health Commissioner Bundson, Commissioner of Health Allman and Poundmaster McCauley. The bill sets up verbatim sections 3955, 3956, 3962, 3963 and 3964 of the Revised Code of Chicago, 1931, and sections 1 and 2 of the City Ordinance passed July 20, 1931, as amended December 1, 1931, creating the animal care section of the Police Department.

The bill avers that on February 24, 1933, Irene McLaughlin, who by the natural affection existing between complainant and a two year old white, mixed brown and black spotted male fox-bull

10752

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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dog named "Spotty" purchased and presented the dog to complainant, together with the money necessary to purchase a collar and obtain a city license tag; that complainant caused the dog to be registered for license in the office of the City Clerk, provided the dog with a muzzle and collar and a dog license numbered 4305; that "Spotty" is not fierce or dangerous; that defendants on July 11, 1933, caused the dog to be taken up at 35th street and Damen avenue in the City of Chicago and to be impounded in the Municipal Animal Shelter, alleging that he was without a collar and license tag; that within five days complainant demanded the return of the dog from defendant McCauley, poundmaster, which was refused unless complainant would pay 75 cents, the expense for taking and keeping the dog, and also pay another license fee of three dollars, or obtain a determination by the City Clerk that the license fee had been paid as provided by the "said pretended ordinances."

The bill further alleges that "Spotty" is worth \$100 and is of sentimental value to complainant, who cannot be adequately compensated for his loss in terms of money; that complainant is informed and believes that in compliance with the pretended ordinances defendants have threatened to appropriate the dog for their own use as property of the defendant City of Chicago, without compensation to the owner or process of law, and thereupon, to the unlawful damage of the taxpayers of the City and in violation of the Criminal Code of the State of Illinois, give the dog away, so unlawfully to be acquired, to some hospital, or other institution, for the specific purpose of vivisection or dissection, for observation of and experimentation on normal or morbid physiological processes of his living body, as contemplated by the pretended ordinances, unless restrained by the court.

The bill further alleges that such action is contrary to section 144 of the Criminal Code, and that the ordinances are void

for reasons set forth at length. The prayer of the bill is that the City and its officials may be restrained from disposing of "Spotty" or any dog impounded by them for purposes of vivisection or without judicial process; that upon the final hearing the ordinances may be declared null and void. The bill also prayed for process and for an injunction.

July 13, 1933, the injunction issued restraining the City and its officials as prayed, and the injunction was duly served on the officials and "Spotty" was released on bail given by the prochein ami. On July 18, 1933, the University of Chicago, The University of Illinois, Northwestern University, Loyola University, Chicago Medical School and Michael Reese Hospital were given leave to enter their appearance and file an intervening petition, to which complainant filed a demurrer which was overruled; whereupon, all the defendants filed general and special demurrers to the bill, (leave having been given to certain defendants who had theretofore answered to withdraw their answers) and upon the hearing the demurrers were sustained as to complainant Ennis, and on motion of complainant the bill was dismissed as to him. Said demurrers were overruled as to complainant Arthur F. Roestner and his next friend, and an order was entered that defendants plead or answer to the bill of complaint within fifteen days.

December 20, 1933, the City of Chicago and its officials filed a plea to the effect that since the filing of the bill of complaint, Mayor Kelly in the exercise of the discretion granted to and reposed in him as Mayor of the City of Chicago, by the Municipal Code of the City of Chicago, and particularly by sections 3962 and 3963 thereof, released the dog "Spotty" owned by complainant without the payment of costs or redemption fees. The release was set up verbatim. It is dated December 8, 1933, and directs McCauley as Superintendent of the Municipal Animal Shelter to "please release

the dog belonging to Arthur F. Koestner without payment of any cost of redemption fees and this shall be your authority." The plea also avers that "Spotty" has been released from the Shelter and returned to complainant Arthur by Irene McLaughlin, his next friend. This plea is verified by McCauley, who says that he is the Poundmaster of Chicago and in charge and control of the dogs confined in the Municipal Animal Shelter, and is the accredited representative of each and all of the defendants; that he has read the plea subscribed by him, and that he knows the contents thereof and that the same is true.

A similar plea was filed on the same day by the intervening defendants, educational institutions and hospitals, and verified by A. G. Ivy, head of the department of Northwestern University in charge and control of the matters involved in the proceeding.

January 26, 1934, defendants by their counsel moved the court to sustain the pleas and dismiss the bill. On the same day complainant gave notice of a motion to strike the pleas and in support of that motion submitted the report of the custodian of "Spotty." This report is signed by "Irene McLaughlin, by Elsie Viola Larsen," and verified by Miss Larsen as the duly authorized agent of Irene McLaughlin in the matter of the custody of "Spotty." The report shows the entry of a temporary writ of injunction on July 13, 1933, and the placing of the dog in her custody upon her giving bond to be approved by the Clerk of the Court, which the affidavit says was given; that she thereafter caused the injunction to be served upon defendants, and that pursuant to the order "Spotty" was on July 13, 1933, turned over to her; that she received the dog from defendants pursuant to the court order; that continuously ever since she has had the custody of the dog and has given it the best of care, and that the dog is in good health and condition.

Upon the hearing, as already stated, the plea was sustained

and the bill dismissed, while the counter-motion to strike was denied. It is the theory of defendants that upon the release of "Spotty" from the custody of the city, the controversy between these parties was at an end; that the fact of such release was established by the verified pleas which were not denied, and thereupon the controversy became a moot case, which Illinois courts refuse to entertain. This seems to be the rule established by a long line of decisions. Hoig v. Thrap, 84 Ill. 302; Union Coal Co. v. City of La-Salle, 136 Ill. 119; Leshner v. Leshner, 250 Ill. 382; Wendell v. City of Peoria, 274 Ill. 613; Leven v. People, 46 Ill. App. 306; Washburn v. People, 50 Ill. App. 93; People v. Cannon, 146 Ill. App. 255; Mannosier v. City of Chicago, 173 Ill. App. 63.

Complainant suggests that the pleas were sham pleas because it is said, "Spotty" was not actually confined in the dog pound at the time the release was executed by the Mayor. It is said that defendant had no right in "Spotty," possession had been taken from them by order of the court and the release was therefore void and without effect. We do not so understand the record. The disposition made of "Spotty" by the court was ~~the~~ only temporary. He remained the subject matter of the litigation and was subject to the jurisdiction of the court. When the City released its claim the actual controversy between the parties disappeared. When that fact was made to appear the case became moot. We are not concerned with technical points with reference to the pleas. The pleas are verified. No material fact in them was denied. The manner in which the information was given to the court that the case had become moot is wholly immaterial.

Complainant is right in saying that the Civil Practice act is not applicable to this proceeding, as a reference to rule 1 of the Supreme court will show, but that is immaterial. The case is moot. The determination of the validity or invalidity of these ordinances must await a real controversy.

The order is affirmed.

ORDER AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

37521

CENTRAL REPUBLIC TRUST COMPANY,
a Corporation,

Appellee,

vs.

SIMON L. LEVY,

Appellant.

Appeal from Municipal Court
of Chicago.

278 I.A. 624²

MR. JUSTICE MARCHETT DELIVERED THE OPINION OF THE COURT.

On June 27, 1933, plaintiff, Central Republic Trust Company, caused a judgment by confession to be entered against defendant, Simon L. Levy, upon a note containing power of attorney so to do. The note is in evidence. It was dated at Chicago, Illinois, June 9, 1932, and was for the amount of \$600, due July 11, 1932, to the order of the United American Trust & Savings Bank, and payable at its office in Chicago. The back of the note bears an endorsement by the payee, by its cashier, and shows payments on August 17, 1932, of \$50 and on September 19, 1932, of \$16.23. The judgment as entered was for the sum of \$649.28, including attorney's fees. On August 7, 1933, on motion of defendant, supported by his affidavit to the effect that the indebtedness had been paid in full, the judgment was opened and leave given defendant to appear and defend.

On the same day defendant filed a jury demand, and on August 12, 1933, an affidavit of merits in which he admitted the execution of the note on June 9, 1932, and averred that on September 19, 1932, there was a balance of \$550 due on the note, and that on that day he paid the the indebtedness in full to Fred P. Rondeau, receiver of the United American Trust & Savings Bank. The affidavit also averred that plaintiff was not a holder in due course before maturity; that defendant was not indebted to plaintiff on the note, and that the note had been paid in full.

The issues were submitted to the jury, which returned a verdict for plaintiff, on which motion for a new trial having been overruled,

judgment was entered. From this judgment defendant gave notice of appeal, which he has perfected. He contends in this court that the evidence does not support the judgment; that the court erred in its ruling on the admission and exclusion of evidence and in refusing to give an instruction requested by him. He also contends that plaintiff is not a holder of the note in due course before maturity.

Plaintiff is a bank located at 134 South LaSalle street, Chicago. Upon the trial Mr. Vogel (in charge of its collateral from November 15, 1932, and prior to that time collateral teller for the Central Republic Bank & Trust Co.) testified that the note was in the possession of plaintiff, the owner of it, and that so far as he knew the note had never been paid. He identified a writing produced which appears in the record as plaintiff's exhibit 2. The writing, designated as a "customer's collateral receipt," is on the printed stationery of the Central Republic Bank & Trust Co., is dated at Chicago, June 11, 1932, is signed, "Received by Geo. Vogel, teller," and acknowledges the receipt of the note sued on, together with other notes described, from the United American Trust & Savings Bank, Chicago, Illinois. Mr. Vogel testified that he recalled that he signed the writing on the date it bears, June 11, 1932, and then put it in the files on record, and that a receipt was given to the messenger from the bank.

The assistant cashier of the plaintiff bank testified that he was employed in that capacity in June, 1932; that he had charge of the books, accounts, records, ledgers and other books showing deposits of money and obligations of the bank; that it was the practice of the bank in June, 1932, upon receiving collateral, for the teller to make out duplicate receipts, one of which he would give to the customer and put the other in his desk to be given to the collateral record teller, who posted it as soon as he got it; that "posting" meant that a record item was transcribed from the

receipt to a collateral record; that this was a record of all collateral received to secure loans that were made. The cashier stated that the document was made in the bank under his supervision in the course of business, as he had described it; that the record was an accurate representation of the facts. The record was received in evidence as plaintiff's exhibit 3 over objection, and shows in substance that the note upon which suit was brought was received from the United American Trust & Savings Bank July 11, 1932.

Defendant testified that he executed the note June 11, 1932, and that he saw it again about August 15, 1932, at the United American Trust & Savings Bank, and at that time paid \$50 to the assistant receiver of the bank; that he went to the bank at that time in response to a notice he received by mail on July 19, 1932; that on August 15th he talked with the assistant receiver of the bank. Objections to questions as to conversations with the receiver were sustained. He testified, however, that he paid \$50 to the assistant receiver on August 15, 1932, and \$16.73 on September 15, 1932.

Section 59 of the Negotiable Instruments Act (Cahill's Ill. Rev. Stats. 1933, chap. 98, sec. 59, par. 97, p. 1920) provides that every holder is deemed prima facie to be a holder in due course, but that when it is shown that the title of any person who has negotiated the instrument is defective, the burden is on the holder to prove that he, or some person under whom he claims, acquired the title as a holder in due course. Section 58 of the same statute provides that in the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable.

If we might hold the evidence recited raised an issue of fact as to whether plaintiff was a holder in due course, that issue must be regarded as determined in favor of plaintiff by the

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Section 10 of the Copyright Act (1909) provides that the author of a work shall be entitled to the copyright therein for the term of years therein provided, but that the copyright shall not extend beyond the life of the author and seven years after his death. In the case of a work made for hire, the copyright shall be owned by the employer or the person for whom the work was made, and the term of copyright shall be for the term of years therein provided, but not more than twenty-eight years. The Act also provides that the copyright in a work shall be subject to the provisions of the Act relating to the assignment of copyright.

It was found that the evidence presented in the case of the defendant was not sufficient to establish his guilt beyond a reasonable doubt. The court therefore acquitted the defendant on all charges.

verdict of the jury. The cases holding that the verdict of the jury is binding upon conflicting issues of fact unless against the manifest weight of the evidence, are too numerous to require citation. A few are Green v. Mummer, 138 Ill. 434; Chicago & Eastern Ill. R. R. Co. v. Hines, 183 Ill. 482; Dowling v. Maclean Drug Co., 248 Ill. App. 370; Voellinger v. Kohl, 261 Ill. App. 271. In this case, in view of the presumption arising from the possession of the note duly endorsed, of positive testimony of Vogel and the written evidence corroborating his testimony, a different verdict by the jury would be set aside as manifestly contrary to the evidence.

Defendant complains that evidence offered by him to the effect that he had not been notified by the Central Republic Bank & Trust Co. that it held the note and that his conversation with the assistant receiver with reference to the note was excluded. Defendant offered to show that in a conversation the assistant receiver promised he would credit defendant with the amount then on deposit in the bank and upon payment of the difference between the amount the bank owed defendant and the amount due on the note, the note would be cancelled and returned to him. There was no offer to show that any representative of plaintiff was present at the time of such supposed conversation, nor offer to show that the assistant receiver had authority from plaintiff, or anyone else, to make such representations. Indeed, there was no competent evidence that he was in fact the assistant receiver. For these reasons the evidence clearly was inadmissible. Moreover, if it be assumed that he was a duly appointed receiver he would have only such authority as might be given to him by order of the court. Kneisel v. Ursus Motor Co., 316 Ill. 336; Chicago City Ry. Co. v. People, 116 Ill. App. 633; Hansen v. Cole, 189 Ill. App. 19; Wolkoff v. Woodlawn Trust & Savings

Bank, 265 Ill. App. 311. We think there was no reversible error in the rulings of the court on the admission and exclusion of evidence.

Defendant complains that the court refused to instruct the jury, as requested by him, that the maker of a note is entitled to deal with any person having possession of the note executed by him and may rely upon the possession of said note by the holder as sufficient proof of the ownership thereof and may deal with the holder as the owner thereof; that the law presumes that the person having possession of the note is the owner of it and is entitled to receive payment thereof as fully as if he were in fact the owner of the note where the person dealing with such holder has no notice of the rights of any third persons. Authorities are cited, and plaintiff concedes that the rule is applicable where the maker of a note has paid the note to a person having possession of it. The evidence in this case, however, shows that all the payments which defendant testified were made on August 17th and September 19th, 1932, were in fact credited upon the note, and, as plaintiff points out, in view of this uncontradicted evidence the instruction was not applicable to the issues and would have tended to confuse the jury if it had been given. It was therefore rightly refused.

We have given careful examination to all the testimony and are satisfied that the judgment entered in this case is the only one that could have been allowed to stand under the evidence, and it is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

37551

MICHAEL KUNICKI, Assignee of EUGENE
BLAKE,

Appellant,

vs.

A. J. HASSENFOSS and WILLIAM KOHL,
Doing Business as LINCOLN BAG COMPANY,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

273 I.A. 624³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Michael Kunicki prosecutes this appeal from an order entered May 10, 1934, denying his motion to set aside a prior order entered May 4, 1934. His motion was supported by a verified petition setting up facts disclosed by the record, as follows:

August 28, 1933, Lillian Brenberg recovered a judgment in the Municipal court in case No. 2391337 against Eugene Blake and Antoinette Blake for the sum of \$95.50 and costs. An execution issued and was returned, and on April 4, 1934, a summons in garnishment in the suit of Eugene and Antoinette Blake for the use of Lillian Brenberg issued out of the Municipal court and was served on A. J. Hassenfoss and William A. Kohl, doing business as the Lincoln Bag Co., as garnishees, on April 13, 1934.

April 4, 1934, Eugene Blake recovered a judgment against A. J. Hassenfoss and William A. Kohl, doing business as the Lincoln Bag Co., for the sum of \$100. On the same date that this judgment was entered Eugene Blake by a writing under seal assigned the judgment to Michael Kunicki. This written assignment was on that date duly filed in the office of the clerk of the Municipal court of Chicago, and on the same date Eugene Blake notified defendants that the judgment had been assigned to Kunicki. The following day, April 5, 1934, Hassenfoss and Kohl admitted in writing the receipt of such notice. The case in which said judgment was recovered was designated as No. 2219067.

Hassenfoss and Kohl having been served with garnishee

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summons April 13, 1934, filed an answer as garnishees, stating in substance that they had in their hands money to discharge the claim of the garnisher, or the assignee of Eugene Blake, Michael Kunicki, as the court might determine, and prayed they might be dismissed as garnishees. April 16, 1934, an order was entered in case No. 2391337, on motion of plaintiff that a rule be entered on the adverse claimant to file an intervening petition in ten days.

April 23, 1934, a notice addressed to Solomon Axelrod, 188 W. Randolph street, and signed "Cohn, Ferdinand & Bernstein, Attorneys for Plaintiff," was served. It was as follows:

"This is to advise you that a garnishment was filed against A. J. Hassenfoss and William R. Kohl, doing business as Lincoln Bag Company, returnable in the Municipal Court of Chicago, on the 16th day of April, 1934, as case No. 2391337, wherein an answer was filed by the above named garnishees, alleging certain moneys due, and which answer discloses that you have some interest in said funds.

You are therefore notified, that the above matter has been set for May 3, 1934, in room 921, in the Municipal Court of Chicago, and that you are to file within ten days from the 21st day of April, 1934, an intervening petition setting forth all your rights, title and interest as to the above mentioned funds now in the hands of A. J. Hassenfoss and William R. Kohl, doing business as Lincoln Bag Company."

May 4, 1934, without further notice to Michael Kunicki, or his counsel, an order was entered which recited that it appearing to the court that judgment was entered April 4, 1934, in favor of Eugene Blake for \$111.65, that an assignment thereof was made to Michael Kunicki, that garnishment summons was served upon defendants April 16, 1934, in case No. 2391337, entitled Eugene Blake and Antoinette Blake for the use of Lillian Erenberg v. A. J. Hassenfoss and William R. Kohl, doing business as Lincoln Bag Co., that the garnishees filed a written answer in the cause, stating that the amount of the judgment rendered in case No. 2219067 was claimed by Lillian Erenberg and also by Michael Kunicki, as assignee, that May 3, 1934, the court having entered judgment against defendants as garnishees in case No. 2391337, and defendants having paid the amount of the judgment in open court, and the same having been applied on the judgment and costs rendered in favor of Lillian

Erenberg, it was ordered that the said judgment should be satisfied of record.

May 9, 1934, Kunicki served notice on the attorneys for Lillian Erenberg and the attorneys for Rassenfoss and Kohl, garnishees, that on the following day he would move to set aside the order of May 4, 1934, which had been entered without notice, and attached to the notice was a copy of his verified petition which set up in substance the foregoing facts. The petition averred that Solomon Axelrod was the attorney for Eugene Blake in obtaining the judgment against Kohl and Rassenfoss; that Kunicki procured Axelrod to prepare the notice of assignment which was mailed to defendants in that suit on April 4th; that he had learned on May 8, 1934, of the entry of the draft order of May 4, 1934, without notice to Solomon Axelrod or to petitioner as assignee, or to the original plaintiff; that he had no knowledge and had never received notice of the pendency of the other case, or the garnishment filed in it, "nor was he ever notified according to the statute and the rules of this court." The petition further averred that upon the filing of the assignment of judgment on April 4, 1934, and the serving of notice and the payment of fees of Solomon Axelrod, Axelrod ceased to be Kunicki's attorney "in this particular matter," and that since that time one Kaiser had represented Kunicki; that Kaiser received no notice of the filing of a draft order in the case until May 8, 1934, after the order had been entered; that Kunicki had talked with Axelrod and was advised by him of the service of the purported notice; that Axelrod filed an intervening petition April 27, 1934, within the time ruled, stating that he had no interest in the funds but that Kunicki was the owner of the judgment and entitled to the proceeds thereof.

As already stated, upon the presentation of this petition May 10, 1934, the court entered an order denying the motion, and

this appeal followed. There is, of course, no doubt that the assignment of the judgment by Eugene Blake on April 4, 1934, (provided it was for a valuable consideration and in good faith) being prior in time to the service of the garnishment summons, was controlling and gave to the assignee a right to the fund as against the garnishers. Knight v. Griffey, 161 Ill. 35; Williams v. West Chicago St. Ry. Co., 199 Ill. 57. The entry of the draft order of May 4, 1934, without an adjudication of Kunicki's claim and without notice to him, would be erroneous. Craig v. Chicago Trust Co., 236 Ill. App. 223; Farner v. Fowler, 288 Ill. 494.

The garnishees, however, contend that the service of the notice to intervene upon Axelrod, who was attorney of record for Kunicki in case No. 2219067, was sufficient to authorize an adjudication of the rights of Kunicki and the entry of an order. It is pointed out that it was not until May 6, 1934, that the appearance of Sulzer as attorney for the assignee Kunicki was substituted, and it is said that Kunicki having failed to comply with the order requiring him to intervene and defend his interests, the court properly treated the failure as a default and entered judgment in favor of Lillian Erenberg.

It is urged that the service of notice on the attorney of record, Axelrod, was sufficient under rule 299 of the Municipal court (see Civil Practice Rules and Forms of the Municipal Court, 1933, p. 196) which provides:

"In respect to the service of papers, summonses and writs excepted, required to be served upon parties to actions the following regulations shall apply:

First. In the absence of an express provision that any such paper shall be served upon a party personally, the same shall be served upon his attorney if he shall have appeared in the action by attorney."

Defendants say that Knight v. Griffey and Craig v. Chicago Trust Co., supra, are not in point because, under this rule, Kunick was in default for failure to file his intervening petition. They

cite rule 118 of the Municipal Court (Civil Practice Rules and Forms of the Municipal Court of Chicago, rule 118, p. 87) which provides:

"In all actions other than those in the preceding Rules 109-114 mentioned, if the defendant makes default in filing a defence the plaintiff shall be entitled to such judgment upon the statement of claim as the court shall consider he is entitled to."

Defendants also undertake to justify under rule 120 of the Municipal Court (Civil Practice Rules and Forms of the Municipal Court, rule 120, p. 88) which provides:

"In any case in which issues arise in an action other than between plaintiff and defendant, if any party to any such issue makes default in filing any pleading required to be filed the opposite party may apply to the court for such judgment, if any, as upon the pleadings he may appear to be entitled to. And the court may order judgment to be entered accordingly or make any such other order as may be necessary to do complete justice between the parties."

These rules are applicable where parties have appeared by attorney. They are not applicable here. The proceedings necessary in garnishment cases where it appears to the court that the property in question is claimed by an adverse party through assignment or otherwise are set forth in the garnishment statute. See Cahill's Ill. Rev. Stats., 1933, chap. 62, sec. 11, p. 1515. It is there provided that if such a claimant does not voluntarily appear, notice for that purpose shall be issued and served on him in such manner as the court or justice shall direct. This plainly means personal service. Bartlett & Kling v. Willis Mfg. Co., 106 Ill. App. 248. Here, there was no personal service. Indeed, the notice to Axelrod was not even addressed to Kunicki. His rights could not be adjudicated in a collateral proceeding without notice given according to the provisions of the statute.

Finally, defendants contend that the failure to give notice was immaterial because there was a hearing on the merits at the time Kunicki made his motion to set aside the prior order. It is said that at that time Kunicki presented fully in his petition and

also take into account the fact that the defendant is a person of good character and has no previous record.

provision:

"In all cases where the defendant is a person of good character and has no previous record, the court may, in its discretion, suspend the execution of the sentence for a period of not less than one year and not more than five years."

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Court, June 12, 1911, 101 Cal. 101.

"In any case in which the defendant is a person of good character and has no previous record, the court may, in its discretion, suspend the execution of the sentence for a period of not less than one year and not more than five years."

These cases are all cases in which the defendant is a person of good character and has no previous record.

respectively. They are all cases in which the defendant is a person of good character and has no previous record.

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in which the defendant is a person of good character and has no previous record.

otherwise the court may, in its discretion, suspend the execution of the sentence for a period of not less than one year and not more than five years."

III. Now, then, what is the result of the above cases? It is that

provided that it is a person of good character and has no previous record, the court may, in its discretion, suspend the execution of the sentence for a period of not less than one year and not more than five years."

For that purpose shall be deemed to be a person of good character and has no previous record.

the court may, in its discretion, suspend the execution of the sentence for a period of not less than one year and not more than five years."

service. People v. Smith, 101 Cal. 101.

Here, there was no previous record. Indeed, the court so held.

was not even charged with a crime. It is clear that the court was not even charged with a crime.

case in a case in which the defendant is a person of good character and has no previous record.

the execution of the sentence.

Finally, the court held that the failure to give notice

was immaterial because there was a hearing on the merits at the time

London was his case. He was a person of good character and has no previous record.

that at that time London was in his position and

exhibits the merits of his contention to the trial court, and that it is not even suggested that the overruling of the motion was an abuse of the court's discretion. Defendants cite Peoples v. Wade, 258 Ill. App. 138; Verst v. Foreman State Bank, 270 Ill. App. 484. An examination of the record discloses that this contention cannot be sustained. There was no hearing upon the facts. On the contrary the court upon the filing of the petition denied its prayer, apparently upon the theory that it stated no cause for relief. The cases cited are therefore not applicable.

Defendants also contend that a garnishee who has paid a judgment in open court in accordance with the order of the court will be protected against a second payment and cite Born v. Staaden, 24 Ill. 320, and Stelk on Illinois Law of Attachment and Garnishment, which states, in substance, that a bona fide assignment of a debt before the service of the garnishee process may defeat it, but it must be shown to be a bona fide assignment upon a consideration passed, and that it would be a good defense by the garnishee to an action to show a judgment against the garnishee in attachment proceedings, and that the assignee, upon reasonable notice, had neglected to appear and vindicate the good faith of his assignment. It is the fundamental rule that service of a proper notice is a condition precedent to depriving any one of a property right. The rule announced assumes the service of notice as provided by statute.

Defendants finally contend that the setting aside of a default order is within the sound discretion of the trial court and not reviewable on appeal, except for abuse of discretion. There is no doubt about that rule, but in this case there was neither order of default nor service upon which such order might have been entered. Upon the showing we think it was an abuse of discretion for the court to enter an order which precluded an investigation as to the actual facts.

For the reasons indicated the judgment is reversed and the cause remanded with directions that a rule be entered on the garnishees to answer the petition.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and McSurely, J., concur.

THE ABOVE INFORMATION WAS OBTAINED FROM THE RECORDS OF THE
FEDERAL BUREAU OF INVESTIGATION, U. S. DEPARTMENT OF JUSTICE,
WASHINGTON, D. C.

37661

JIM MARINO,

v.

MORRIS WHITE

Consolidated with R. H. DIETZ,
SOL BERMAN and ALFRED PROPPER,
copartners, doing business as
R. H. DIETZ & COMPANY, as Assignees
of WALTER WISHNOW,

v.

MORRIS WHITE and NATIONAL RESERVE
INSURANCE COMPANY, a Corporation.

On Appeal of NATIONAL RESERVE
INSURANCE COMPANY, a Corporation.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

273 I.A. 624⁴

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

December 7, 1933, two attachment writs issued out of the Municipal court of Chicago against Morris White as defendant. Jim Marino was plaintiff in one of these suits, which was case No. 464707. In the other case, No. 2210493, the plaintiffs were R.H. Dietz, Sol Berman and Alfred Propper, copartners doing business as R. H. Dietz & Co., as assignees of Walter Wishnow. In both cases by direction the National Reserve Insurance Co., a corporation, was served as garnishee. In each of the original cases, defendant Morris White was served by publication. January 29, 1934, judgment by default was entered - in case No. 464707 for \$700 and in case No. 2210493 for \$632.07. On the same day the cases were consolidated so far as the proceedings against the garnishee were concerned.

The garnishee answered that it had theretofore issued its policy No. 531118 insuring Morris White in the amount of \$2000 against loss or damage by fire to the contents of the building located at 1133 Argyle avenue, Chicago; that on November 8, 1933, the property located there was damaged by fire; the policy provided "This entire policy, unless otherwise provided by agreement endorsed

hereon or added hereto, shall be void *** if the subject of insurance be personal property and be or become encumbered by a chattel mortgage." The garnishee further said that the subject of the insurance was personal property; that it was encumbered by a chattel mortgage executed by Morris White, the insured, on April 18, 1933, conveying the insured property to Max Levy; that the policy was therefore void prior to the time of the fire; that the policy also provided:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated therein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

The garnishee further answered that White with intent to cheat and defraud falsely and fraudulently swore in a statement in proof of loss given by him to the garnishee, on December 7, 1933, that at the time the policy was issued there was no encumbrance upon the property insured, although he well knew that there was an encumbrance upon the property by reason of this chattel mortgage, and that by reason of this fraud and false swearing the policy was void and of no effect.

The answer further said that the policy provided:

"If ~~any~~ fire occur the insured shall give immediate notice of any loss thereby in writing to this company. * * *

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements."

It was averred that the insured did not give immediate notice of loss in writing, and that his failure so to do was a bar to the maintenance of any action; that through its adjuster it had entered into an agreement with White that the amount of loss and damage was the sum of \$632.07; that this agreement was expressly limited to the determination of the amount of loss and damage sustained; that the garnishee at all times reserved ^{its rights under} ~~understands~~

the policy of insurance and did not agree to pay the sum of \$632.07; that by reason of the breaches set forth it was not liable to White in that sum, or any sum, and that the claim of White was not subject to garnishment but was one the validity of which could be determined only in a direct action upon the policy, wherein the issues might be determined by the verdict of a jury as guaranteed by the Constitution of the State.

The garnishee further answered that on November 29, 1933, White had assigned his interest to Nathan Spira and prayed that Spira be impleaded in such manner as the court might direct and the garnishee be discharged. The answer was contested.

Upon the hearing plaintiff called Max Levy as a witness. He testified that he lived at 1656 St. Louis avenue and was a brother-in-law of Morris White; that he had never loaned White any money, had never seen a chattel mortgage from White to him, and that he never got any notes from him.

Plaintiff also called B. L. Spira (an insurance adjuster for plaintiff) who testified in substance that he met Mr. Salomon, the adjuster of defendant insurance company, November 9, 1933; that Salomon told him that the Insurance company would pay \$632.07 on account of the loss, and that he told Salomon that he would accept that amount on behalf of White. On cross examination he was asked, "And after you got through, the sum and substance was that you arrived at a certain figure which the two of you agreed was the amount of loss and damage," to which he replied, "That is right."

Mr. Salomon, the adjuster for defendant company, testified that he had talked with Spira about the loss and damage, and that they finally agreed it amounted to \$632.07, but that he did not say that the Insurance company would pay that amount; that he had never told Spira, or the assured, or anyone, that he would pay the loss and damage.

The policy was received in evidence. Defendant also introduced in evidence a certified copy of a chattel mortgage for \$800 filed in the Recorder's Office of Cook county on April 26, 1933, and recorded as B686110, by which it appears that Morris White on April 16, 1933, conveyed the personal property therein described and stated to be situated at 1133 Argyle avenue, Chicago, Illinois, to Max Levy. The chattel mortgage notes Nos. 1 to 12 signed by Morris White, and apparently representing the indebtedness described in the mortgage, were also introduced in evidence.

The answer of a garnishee is to be taken as true until disproved, and the burden to disprove the truth of such answer is upon the plaintiff in cases of this sort. Kergin v. Dawson, 1 Gilm. 86; Cairo & St. L. R. R. Co. v. Killenberg, 32 Ill. 295; Manowski v. Conroy, 33 Ill. App. 141; Reid Murdoch & Co. v. First Nat'l Bank, 135 Ill. App. 49. If the averments set up in the answer were true, defendant garnishee was not liable to White upon the policy because of the encumbrance upon the property by way of chattel mortgage (Crikelair v. Citizens' Ins. Co., 168 Ill. 309) as well as for the other reasons mentioned, and the action of an adjuster in agreeing upon the amount of loss and damage would not bar the insurer from asserting the breach of any of the conditions of the policy. Oberman v. U. S. Fire Ins. Co., 313 Ill. 172.

This court held in Shraiberg Mfg. Co. v. Boston Ins. Co., 246 Ill. App. 196, that garnishment proceedings would not lie to enforce a claim made under a policy of insurance where the claim itself was contingent or unliquidated. That case was followed in the later case of Wilson, Ave. Bathing Beach Co. v. North British & Mercantile Ins. Co., 347 Ill. App. 627, and by this division of the court in Raymond v. Girard Fire & Marine Ins. Co., 243 Ill. App. 642, Plaintiff relies on Manover Fire Ins. Co. v. Connor, 20 Ill. App. 297, which was distinguished in the Shraiberg Mfg. Co. case, and

also relies on Ackerman v. Tobin, 22 Fed. (2nd) 541. This last case is, however, clearly distinguishable, by the fact that there the insurance companies who were garnisheed paid their money into court admitting it to be due, and asked the court to determine to which claimants the money should be applied. It would serve no useful purpose to discuss these authorities. This court is committed to the rule laid down in the Schraiberg Mfg. Co. case, that a claim contingent in its nature is not subject to garnishment. Here, the claim of the insurer under the policy is uncertain and unliquidated. The garnishee is not liable.

The judgment is reversed.

REVERSED.

O'Connor, P. J., and McSurely, J., concur.

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1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 26

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37681

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JOE LATRULO,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

278 I.A. 6251

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant sued out this writ of error to reverse a judgment in the trial court entered upon a finding that he was guilty of violation of section 3 of the Narcotic Drug Control Law, approved July 3, 1931, (see Smith-Hurd's Ill. Rev. Stats. 1933, chap. 38, par 192c, sec. 3). The information filed April 18, 1934, charged that defendant, "to-wit, on the 16th day of April, A. D. 1934, at the City of Chicago, County of Cook aforesaid, did then and there unlawfully possess and have under his control a certain habit forming drug, to-wit, Marihuana," in violation of the statute. The record shows a plea of not guilty, a waiver by defendant of trial by jury, the finding of the court that defendant was guilty in manner and form as charged in the information, the overruling of motions for a new trial and in arrest of judgment and the sentence that defendant be committed to the House of Correction for a year and to pay a fine of \$500 and costs.

There is no bill of exceptions, and the principal error argued is that the information does not set up a cause of action.

The Narcotic Drug Control Law consists of 23 sections. Section 2 of the act (Smith-Hurd's Ill. Rev. Stats., 1933, chap. 38, par. 192b, sec. 2) defines the terms used in it. Sub-section 12 of section 2 provides that "'Cannabis indica' 'marijuana', 'loco weed' or 'cannabis sativa,' includes any compound, manufacture, salt, derivative or preparation thereof and any synthetic substitute of any of them identical in chemical composition."

THE UNIVERSITY OF CHICAGO

... ..

250 A. 1002

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

Form of writing in the collection, the number of copies for
the purpose of making the collection and the number of copies for

and be completed at the time of recording in a given case in a

There is no such thing as a free lunch.

The Department of Control Law consists of the following:

27, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628

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"...the results of the chemical analysis..."

Sub-section 13 provides, "'Habit forming drugs' means coca leaves, opium, cannabis indica, cannabis sativa, marijuana, or loco weed." Section 3 provides: "It is unlawful for any person to possess, have under his control, sell, distribute, administer, dispense, or prescribe any habit forming drug except as provided in this Act." Sub-section 1 of section 4 provides that a manufacturer, wholesaler or apothecary may sell or distribute habit forming drugs upon written order to parties named, such as manufacturers, apothecaries, physicians, dentists or veterinarians, public or private hospital, etc., under restrictions therein named. Section 5 of the act provides that its provisions shall not apply to certain medical preparations, prescriptions and remedies which do not contain more than the amounts named, to liniments, ointments and other preparations, which are prepared for external use, with certain exceptions and provided such remedies and preparations are not possessed for the purpose of evading the intentions and provisions of the act. Section 6 provides that under conditions named a veterinarian, dentist, physician or nurse may in good faith and under circumstances named therein prescribe, administer or dispense these drugs. Section 7 states that an apothecary may sell or dispense to any individual upon a written prescription of a physician, dentist or veterinarian under restrictions described in detail in the act.

It is the contention of defendant that the information in this case is insufficient, because it does not negative these different exceptions. The law applicable in such cases has been often stated by the courts of the state. The general rule is that such exceptions should be set forth in an indictment or information where these exceptions are embraced in the same clause of the statute which creates the offense. In such case it is held that the exceptions are descriptive of the offense for which it is intended to

provide punishment and therefore necessary that the indictment which charges the doing of the particular act should negative the exceptions in such a way as to show affirmatively that the precise crime defined and denounced by the statute has been committed. Where, as here, the exceptions are not embraced in the same clause, the general rule is that it is unnecessary for the pleader to negative the exceptions. However, there is an exception to this general rule to the effect as stated in Dreyer v. People, 188 Ill. 40, cited by defendant, "Where the exception or proviso be in a subsequent clause of the statute, or if ⁱⁿ the same section and not incorporated with the enacting clause by any apt words of reference, it is, in that case, a matter of defense and need not be negatived in the pleading."

Under the rule stated it is apparent that the contention of defendant is without merit. That the construction for which defendant contends is contrary to the intention of the legislature is apparent from a consideration of the whole act, which shows that such a construction would result in making the enforcement of the act practically impossible. Dreyer v. People, 188 Ill. 40; Sokol v. People, 212 Ill. 238; People v. Butler, 268 Ill. 635; People v. Callicott, 322 Ill. 390; People v. Saltis, 328 Ill. 494.

Defendant also contends that the indictment is insufficient as not being in the English language and cites State v. Mitchell, 25 Mo. 420. He says that the word "Marijuana" is not found in any standard dictionary; that it is a Mexican word of Spanish origin; hence the indictment does not charge an offense cognizable under the laws of the State of Illinois. It was unnecessary in referring to this drug in the indictment to give its complete scientific name. A reference to the drug in general terms was sufficient. People v. Erittenbrink, 269 Ill. 244. We are not disturbed by the fact, if it be true as defendant says, that the word "Marijuana" is not found in any of the dictionaries. It is in the statute; that is sufficient. The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and McDurely, J., concur.

37707

H. E. DELBARE,
Appellee,

vs.

F. H. MASSMANN, JACOB W. HANSEN,
GEORGE GANNON, JOHN J. SWEENEY
and JOHN E. HESSE,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

278 I.A. 625²

MR. JUSTICE KATCHETT DELIVERED THE OPINION OF THE COURT.

In an action brought under section 37 of the Blue Sky Securities Law (Cahill's Ill. Rev. Stats., 1929, chap. 32, sec. 37, par. 290, p. 711) upon trial by jury, there was a verdict for plaintiff for \$583.75, on which the court entered judgment.

Defendants are directors of the Physicians and Surgeons Institution of Chicago, an Illinois corporation, and their alleged liability is based upon that fact, together with their connection as such directors with the sale to plaintiff by the Utility Underwriters, Inc. (a Delaware corporation) on April 7, 1930, of \$500 par value of certain 6½ per cent gold notes of the Physicians and Surgeons Institution, for which on that date plaintiff paid in cash \$500.

The evidence tends to show that March 29, 1930, a meeting of the board of directors of the Physicians and Surgeons Institution was held at the office of a Mr. Ennis; that there were present at this meeting Mr. Ennis, John J. Sweeney, Fred H. Massmann, Louis Guenzel and George Gannon; that the general manager, George Walters, was also present; that the president reported that he had been informed by J. W. Hansen and John E. Hesse that they were unable to attend the meeting but that they were in accord with the purpose of it and would go on with the other directors in any action that would be taken. The minutes state:

"The chief item of business was the consideration of giving to the Utility Underwriters, Inc., a contract for the flotation of a \$200,000.00 Gold Note Issue, to mature in February, 1931, and to bear 6 1/2% interest. A copy of the consolidated balance sheet of the Company was presented, together with a copy of the circular to be used in connection with the sale, both of which were approved."

The minutes further show that the rate of commission to the Utility Underwriters, Inc., for the sale of the issue was fixed at 20 per cent, with a bonus of \$5,000 stock when, as and if the whole issue was sold. Mr. Cannon was instructed to draw up the necessary contract with the Utility Underwriters and submit it to Ennis, chairman of the finance committee, for approval. Mr. Cannon explained to the directors that he was president of the Utility Underwriters and interested in that company; that he felt that before entering into any contract with them the directors should be so informed. After a thorough consideration of the whole question, the proposition of the Utility Underwriters was approved. Before approving it, however, the directors called John L. Rex, vice-president and treasurer of the Utility Underwriters into the conference, and they went very carefully into the proposition and the methods which Mr. Rex proposed to follow in floating the issue. The motion was then made and carried to the effect that the finance committee was authorized to work out any details of the proposition that might come up in connection with the issue.

April 25, 1930, a meeting of the corporation was held at the Midland club. George Cannon, Fred R. Massmann, Callistus S. Ennis, Louis Guenzel, John J. Sweeney, Jacob W. Hansen, John E. Hesse, directors, and George Walters, general manager, were present. On motion of Hansen, seconded by Hesse, it was unanimously resolved to approve the contract with the Utility Underwriters made by the finance committee. At the same time on motion of Massmann, seconded by Hesse, it was unanimously resolved to make a payment of \$10,000 and notes for the interest due on the North Chicago Hospital, de-

pending on the results of the meeting to be held the next Monday. At the same meeting, the treasurer having resigned, John J. Sweeney was elected treasurer.

The Utility Underwriters was a Delaware corporation, with office supposed to be at 176 West Adams street, Chicago. Mr. Cannon had a desk in that office. On the evening of April 6, 1930, plaintiff Delbare was called on the phone by someone who said he was from the Physicians and Surgeons Institution. The following day plaintiff went to the office of the Utility Underwriters, which was the office he says the man on the phone gave him, where he was met at the door by a man who took him farther back into the office and introduced him to Mr. Cannon who was sitting at a flat top desk or table. Plaintiff handed to Mr. Cannon a check for \$500 dated April 7, 1930, signed by himself and payable to the order of the Physicians and Surgeons Institution. The check was cashed by the payee and is in evidence. Plaintiff says that he told Mr. Cannon that he would take the bonds and certificates if a stock subscription contract held by that corporation, on which ^{a balance} was due from plaintiff to the Physicians and Surgeons Institution would be cancelled. Plaintiff had already paid \$500 for five shares of the stock. The balance due was \$1000. Plaintiff says that Mr. Cannon absolutely promised to cancel the subscription if plaintiff would take \$500 in notes. Plaintiff delivered the check and received the paper in evidence designated as an interim certificate. It is as follows:

"Interim Certificate
Issued by

\$500.00

No. 509

UTILITY UNDERWRITERS, INC.,
176 West Adams St., Chicago, Ill.

This is to certify that S. E. Delbare is entitled to receive Five Hundred Dollars (\$500.00) per value of Six and one half per cent Gold Notes of the Physicians and Surgeons Institute of Chicago--bearing date of March 25, 1930 -- Maturing February 25, 1931, when, as and if the said securities are received by the undersigned, upon the surrender of this certificate properly endorsed.

When said securities have been received by the undersigned

At the same time, the President's Commission on the Assassination of President Kennedy, which was established in 1964, was also investigating the assassination of President Kennedy. The Commission's report, released in 1964, concluded that the assassination was the result of a conspiracy involving several individuals, including Lee Harvey Oswald, who was the assassin. The Commission also found that the Warren Commission, which was established in 1963, had not conducted a thorough investigation of the assassination.

[illegible]

100-100000-100000

624

[illegible]

The purpose of this certification is to certify that the information contained herein was received from the source named above and has been reviewed by the undersigned.

This is to certify that the information contained herein was received from the source named above and has been reviewed by the undersigned.

Gulf States of America Inc., New Orleans, Louisiana

Five United States () and one half per cent
This is to certify that the information contained herein was received from the source named above and has been reviewed by the undersigned.

and are ready for delivery, notice to that effect will be transmitted to the above named holder at his registered address.

This certificate may be transferred by the delivery hereof duly endorsed. "

This document is signed "Utility Underwriters, Inc., by John L. Rex, Vice President," and attached to it is the corporate seal.

Plaintiff has never received the gold notes mentioned in this certificate, nor notice from the Utility Underwriters that the same are ready for delivery. He demanded a return of his money on several occasions, which was refused. He had not before the transaction known Mr. Rex, who signed the certificate, and was not introduced to him.

Defendant Cannon testified that he did not recall meeting plaintiff April 7, 1930, and did not remember that plaintiff handed him a check; that he never had a conversation with plaintiff when anything was said about cancelling the balance due on his subscription for stock to the Physicians and Surgeons Institution. He testified, however, to a conversation with plaintiff in the summer of 1930, when he told plaintiff that the note issue had not been a success; that it would be additional expense to have the notes printed, and that the company was going to recognize the certificate as an obligation and pay the interest and at maturity pay the principal; that thereafter the Physicians and Surgeons Institution did make one payment of interest which was deducted by the court from the amount for which judgment was rendered.

These are practically the uncontradicted facts.

Plaintiff contends that these defendants as directors of the seller are liable under section 37 of the Blue Sky act. The case must be decided under that law as it existed on April 7, 1930, when the transaction of which complaint is made took place. It was proved that the securities were not qualified by filing a statement with the Secretary of State in conformity with the statute. However, defendants contend that the corporation of which they were

and the fact that the Government has not been able to provide a satisfactory explanation for the delay in the delivery of the goods, the Commission has decided to suspend the payment of the advance until the Government has provided a satisfactory explanation for the delay in the delivery of the goods.

1. The first of these is the "general" or "overall" impression of the country, which is the most important factor in the selection of a country for investment.

1900

PI 1001-1002-1003-1004-1005-1006-1007-1008-1009-1010-1011-1012-1013-1014-1015-1016-1017-1018-1019-1020-1021-1022-1023-1024-1025-1026-1027-1028-1029-1030-1031-1032-1033-1034-1035-1036-1037-1038-1039-1040-1041-1042-1043-1044-1045-1046-1047-1048-1049-1050-1051-1052-1053-1054-1055-1056-1057-1058-1059-1060-1061-1062-1063-1064-1065-1066-1067-1068-1069-1070-1071-1072-1073-1074-1075-1076-1077-1078-1079-1080-1081-1082-1083-1084-1085-1086-1087-1088-1089-1090-1091-1092-1093-1094-1095-1096-1097-1098-1099-1100-1101-1102-1103-1104-1105-1106-1107-1108-1109-1110-1111-1112-1113-1114-1115-1116-1117-1118-1119-1120-1121-1122-1123-1124-1125-1126-1127-1128-1129-1130-1131-1132-1133-1134-1135-1136-1137-1138-1139-1140-1141-1142-1143-1144-1145-1146-1147-1148-1149-1150-1151-1152-1153-1154-1155-1156-1157-1158-1159-1160-1161-1162-1163-1164-1165-1166-1167-1168-1169-1170-1171-1172-1173-1174-1175-1176-1177-1178-1179-1180-1181-1182-1183-1184-1185-1186-1187-1188-1189-1190-1191-1192-1193-1194-1195-1196-1197-1198-1199-1200-1201-1202-1203-1204-1205-1206-1207-1208-1209-1210-1211-1212-1213-1214-1215-1216-1217-1218-1219-1220-1221-1222-1223-1224-1225-1226-1227-1228-1229-1230-1231-1232-1233-1234-1235-1236-1237-1238-1239-1240-1241-1242-1243-1244-1245-1246-1247-1248-1249-1250-1251-1252-1253-1254-1255-1256-1257-1258-1259-1260-1261-1262-1263-1264-1265-1266-1267-1268-1269-1270-1271-1272-1273-1274-1275-1276-1277-1278-1279-1280-1281-1282-1283-1284-1285-1286-1287-1288-1289-1290-1291-1292-1293-1294-1295-1296-1297-1298-1299-1300-1301-1302-1303-1304-1305-1306-1307-1308-1309-1310-1311-1312-1313-1314-1315-1316-1317-1318-1319-1320-1321-1322-1323-1324-1325-1326-1327-1328-1329-1330-1331-1332-1333-1334-1335-1336-1337-1338-1339-1340-1341-1342-1343-1344-1345-1346-1347-1348-1349-1350-1351-1352-1353-1354-1355-1356-1357-1358-1359-1360-1361-1362-1363-1364-1365-1366-1367-1368-1369-1370-1371-1372-1373-1374-1375-1376-1377-1378-1379-1380-1381-1382-1383-1384-1385-1386-1387-1388-1389-1390-1391-1392-1393-1394-1395-1396-1397-1398-1399-1400-1401-1402-1403-1404-1405-1406-1407-1408-1409-1410-1411-1412-1413-1414-1415-1416-1417-1418-1419-1420-1421-1422-1423-1424-1425-1426-1427-1428-1429-1430-1431-1432-1433-1434-1435-1436-1437-1438-1439-1440-1441-1442-1443-1444-1445-1446-1447-1448-1449-1450-1451-1452-1453-1454-1455-1456-1457-1458-1459-1460-1461-1462-1463-1464-1465-1466-1467-1468-1469-1470-1471-1472-1473-1474-1475-1476-1477-1478-1479-1480-1481-1482-1483-1484-1485-1486-1487-1488-1489-1490-1491-1492-1493-1494-1495-1496-1497-1498-1499-1500-1501-1502-1503-1504-1505-1506-1507-1508-1509-1510-1511-1512-1513-1514-1515-1516-1517-1518-1519-1520-1521-1522-1523-1524-1525-1526-1527-1528-1529-1530-1531-1532-1533-1534-1535-1536-1537-1538-1539-1540-1541-1542-1543-1544-1545-1546-1547-1548-1549-1550-1551-1552-1553-1554-1555-1556-1557-1558-1559-1560-1561-1562-1563-1564-1565-1566-1567-1568-1569-1570-1571-1572-1573-1574-1575-1576-1577-1578-1579-1580-1581-1582-1583-1584-1585-1586-1587-1588-1589-1590-1591-1592-1593-1594-1595-1596-1597-1598-1599-1600-1601-1602-1603-1604-1605-1606-1607-1608-1609-1610-1611-1612-1613-1614-1615-1616-1617-1618-1619-1620-1621-1622-1623-1624-1625-1626-1627-1628-1629-1630-1631-1632-1633-1634-1635-1636-1637-1638-1639-1640-1641-1642-1643-1644-1645-1646-1647-1648-1649-1650-1651-1652-1653-1654-1655-1656-1657-1658-1659-1660-1661-1662-1663-1664-1665-1666-1667-1668-1669-1670-1671-1672-1673-1674-1675-1676-1677-1678-1679-1680-1681-1682-1683-1684-1685-1686-1687-1688-1689-1690-1691-1692-1693-1694-1695-1696-1697-1698-1699-1700-1701-1702-1703-1704-1705-1706-1707-1708-1709-1710-1711-1712-1713-1714-1715-1716-1717-1718-1719-1720-1721-1722-1723-1724-1725-1726-1727-1728-1729-1730-1731-1732-1733-1734-1735-1736-1737-1738-1739-1740-1741-1742-1743-1744-1745-1746-1747-1748-1749-1750-1751-1752-1753-1754-1755-1756-1757-1758-1759-1760-1761-1762-1763-1764-1765-1766-1767-1768-1769-1770-1771-1772-1773-1774-1775-1776-1777-1778-1779-1780-1781-1782-1783-1784-1785-1786-1787-1788-1789-1790-1791-1792-1793-1794-1795-1796-1797-1798-1799-1800-1801-1802-1803-1804-1805-1806-1807-1808-1809-1810-1811-1812-1813-1814-1815-1816-1817-1818-18

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positive effects on the local community, regional, and national

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It is a shame that the House has a committee on the subject of the

— 1972-1973 —

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

to whom it is referred by the Department of Justice, dated, 1911

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13-00000

and the following are the results of the regression analysis:

SECRET

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DATE: 10/10/1964

1987-1988

To: Mr. J. Edgar Hoover
 From: Mr. [illegible]
 Subject: [illegible]

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Page 31. In the margin of the page, there is a handwritten note: "The above is a copy of the original document." This note is written in a cursive script and is located in the right margin, approximately one-third of the way down the page.

1950-1951

For the purpose of this study, the following data were collected:

THE UNIVERSITY OF CHICAGO

directors did not sell to plaintiff, and that they therefore cannot be held liable as directors of the "seller" under the provisions of the Securities act. They say that as a matter of law this contract of the Utility Underwriters, Inc., with plaintiff^{is} in its own name and under its own seal, and that parol evidence was therefore inadmissible to show that the contract was made by and on behalf of an undisclosed principal.

We do not find this contention meritorious. The minutes of the meeting show that the Utility Underwriters was to act in behalf of the owner corporation of which defendants were directors. It also appears that its attorney (who was one of the directors) conducted the negotiations, and that plaintiff's check was made to the order of Physicians and Surgeons Institution, and that it cashed the check. The cases cited as to the inadmissibility of parol evidence to vary the terms of a written contract under seal state the general rule where a suit is brought upon a contract but are not applicable in a case like this, where plaintiff bases his right to recover upon a provision of the statute which gives him the right to rescind the contract as made. The uncontradicted evidence is to the effect that the contract was made for the benefit of the owner corporation and that it received the consideration. Under these circumstances, defendants cannot deny that the contract was made in behalf of the corporation of which they are directors and that the corporation is the seller within the meaning of the statute.

Defendants contend in the next place that the notes referred to in the interim certificate must be construed to be securities in class "A" and that the seller was therefore not obligated under the law to file a statement with the Secretary of State. As the law existed at the time of this transaction, the classification of securities appears in section 3 of the Securities act (Cahill's Ill. Rev. Stats. 1929, sec. 3, par. 256) which provides that class

"A" securities are securities "the inherent qualities of which assure their sale and disposition without the perpetration of fraud." Section 4 of the act sets forth the different securities comprised in class "A". Sub-section 10 provides: "Being negotiable promissory notes given for full value and for the sole purpose of evidencing or extending the time of payment of the price of goods, wares, or merchandise purchased by the issuer of such notes in the ordinary course of business, and promissory notes or commercial paper running not more than twelve months from the date of issue, and shall be issued within three months after the date of sale."

Defendants say that the notes referred to in the interim certificate must be regarded as valid (even though the same were not at the time of the sale actually in existence) unless it were proved that there was a fraudulent intent on the part of the seller not to issue the notes within three months thereafter. They say that in the absence of any proof of such fraudulent intent (of which it is claimed there is none here) a sale authorized to be made under class "A" could not retroactively be made invalid by construction so as to convert the security from class "A" to class "D". Therefore, they say, the sale must be regarded as a class "A" sale.

We do not accept this construction of the statute. True, the statute describes as class "A" securities promissory notes which "shall be issued within three months after the date of the sale" and "running not more than twelve months from the date of issue." The actual issue of the notes within three months is a condition precedent to the classification in class "A". If the notes are not issued "within three months after the date of the sale," then the same are not class "A" securities. This does not mean, as defendants contend, that the notes are held "retroactively" invalid. The validity of the notes is not affected in the least, and the question of the validity does not arise. The notes described

must be issued within three months after the date of sale. If they are not issued within that time (although perfectly valid) they would not meet the requirements of the statute necessary to be placed in class "A". Any other construction would open the door for fraud of the very kind which the statute is designed to prevent. Such construction would also be entirely inconsistent with the definition of class "A" securities given in section 3 of the act.

Defendants further contend that the notes in question were exempted from the provisions of the Securities law and were class "B" securities. They invoke in this respect the provisions of sub-section 1 of section 5 (Cahill's Ill. Rev. Stats., 1929, chap. 32, par. 258, sec. 5, sub-section 1) which provides, in substance, that an isolated sale of any security by a bona fide owner thereof, or his representative, for the owner's account, such sale not being made in the course of repeated and successive transactions of a like character and such owner not being a broker or dealer in securities or an underwriter of such securities, shall not be subject to the provisions of the act. This provision is one for the exemption of a particular kind of a certain class of securities, and assuming that the notes in question were class "B" securities, the burden of proof was upon defendants to show that this transaction for the sale of the same was an isolated one within the meaning of the exemption. If it was an isolated sale, that evidence was in the possession of defendants and might have been easily produced. It was not produced, but, on the contrary, the evidence in the record indicates that this was not intended to be an isolated sale but rather one of many such sales. We are not unaware of the decisions which hold (especially in criminal cases brought under this statute) that the burden is not upon the defendant in the first instance to show the class to which the particular security belongs. It was so held in People v. Johnson, 355 Ill. 380, in a criminal

that be issued within three months after the date of sale. It may
 are not issued within that time (Section 1011, 1012, 1013)
 would not make the registration of the stock necessary to be
 placed in issue "1011". The court's decision would mean the law
 for the sale of the stock and the company is entitled to payment.
 The corporation will also be entitled to payment for the stock
 which it issues "A" corporation given in section 1011 of the act.
 The court's decision would mean the stock is not validly
 exempted from the provisions of the corporation law and is not valid
 "A" corporation. They intend to take action to prevent the provisions of
 the corporation law from being applied to the corporation. It is
 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50,
 that no limited sale of any property of a corporation is validly
 or his representative, for the corporation's interest, may not be
 made in the nature of a sale and the corporation's representative of a
 line of action and such action may be a breach of duty in some
 cases or an exercise of the corporation's power, which may be subject
 to the provisions of the act. This provision is one of the many
 which of a particular kind of a certain class of corporations, and
 assuming that the nature of the corporation is "A" corporation, the
 burden of proof was upon the corporation to show that this transaction
 for the sale of the stock was an isolated one and that the nature of
 the corporation, if it was an isolated sale, that evidence was to
 the corporation of the corporation and that it was not really protected.
 It was not necessary, but in the majority, the evidence in the
 record indicates that this was not intended to be an isolated sale
 but rather one of many such sales. We are not aware of the
 evidence which was (concerning the evidence which was presented under
 this statute) that the evidence is not upon the defendant in the first
 instance to show the class to which the corporation's property belongs.
 It was so held in People v. Thompson, 195 Ill. 287, in a criminal

case and in a civil case by this court in Oppenheimer v. Saabody, Houghteling & Co., 270 Ill. App. 240. This last named case, however, pointed out clearly the distinction between the necessity of proof as to the particular class in which a security should be designated and an exemption claimed in connection with a security belonging to a particular class under section 5.

We hold the evidence in this case as to the security sold requires it to be designated as class "D".

Defendants contend that plaintiff failed to make a good and sufficient tender, because they say that prior to the beginning his action he did not offer to pay back the amount of interest which had been paid to him on the bonds purchased. However, he voluntarily remitted that amount from the verdict with the approval of the court, and this was we think sufficient under the statute. Morrison v. Farmers Elevator Co., 319 Ill. 372; Stewart v. Brady, 300 Ill. 425. Defendants also contend that the retention of this interest constituted a waiver precluding plaintiff from recovering under the provisions of the statute. He could not thus waive the rights given him by the provisions of the statute. Laurenson v. Lemering & Co., 260 Ill. App. 515.

It is also contended that plaintiff cannot recover because of the fact, as urged, that he is still indebted to the Physicians and Surgeons Institution upon his subscription to its capital stock. That corporation is not a party to this proceeding, and defendants cannot interpose as a defense to this statutory action plaintiff's contractual obligations in that respect. Indeed, we think, upon ^{this} the whole/record discloses a situation for which the statute was intended to give a remedy.

The judgment is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

case and in a single word to this point in the proceedings. The
Constitution, Art. III, Sec. 2, says: "The Trial, shall be by Jury, in all
 criminal cases." This language is not only a declaration of principle, but
 as to the mode of trial, it is a declaration of principle, and as to the
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37716

LU-MI-NUS SIGNS, INC.,
a Corporation,

Appellee.

vs.

ARCTURUS RADIO TUBE CO.,
a Corporation,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

278 I.A. 625³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendant has appealed from a judgment in the sum of \$1366.67 entered upon the finding of the court. The suit of plaintiff was based on a written order mailed from the office of defendant in Newark, New Jersey, May 22, 1933, to the office of plaintiff in Chicago. Its material parts are as follows:

"Deliver to.....Date Required.....

Illuminated sign board in accordance with selection made by our Mr. C. E. Stahl having neon border and to carry copy as per color sketch air-mailed today for a period of 5 months (duration of the Century of Progress) 400 per month"

On May 24th plaintiff wrote defendant at its Chicago office, acknowledging the receipt of the order and copy for preparation of the bulletin display. The letter said further:

"Wish to confirm telephone conversation of yesterday in which we were given to understand that the north face of the existing V-shape sign at the foot of 20th street is that upon which your copy is to appear and the order to be executed. As further identification, this is the display which at the present time bears our own advertisement facing northeast, to be replaced with your advertisement, the reverse side of which facing southeast now carries an advertisement for the parking area.

If the above is thoroughly in accordance with your understanding and the location of your showing confirmed and described above is correct, we ask that you kindly affix your signature to one copy of this letter for our files so that there can be no misunderstanding as to location."

The letter was returned signed by defendant company and its Chicago manager, George J. Riley.

On the morning of June 5th thereafter Mr. Geartner, advertising manager of defendant company, informed Mr. Peterson, vice-

president of plaintiff, that the order was cancelled and about noon of the same day defendant sent by Western Union messenger a letter to plaintiff's Chicago office definitely cancelling the order. This suit for damages followed.

The defense relied on is that by the terms of the agreement (as construed by defendant) plaintiff was to provide an illuminated sign upon the Outer Drive near the Century of Progress during the entire months of June, July, August, September and October, 1933; that time was of the essence of the agreement; that on June 5th (having learned on June 4th that the sign was not erected) defendant communicated with plaintiff and was informed that defendant could not give definite information as to the time when it would be completed. It is therefore contended that defendant had a right to cancel the order.

Much parol evidence was offered and received as to prior negotiations which led up to the giving and acceptance of this order. This evidence was inadmissible. Schneider v. Sulzer, 212 Ill. 87; Fuchs & Lang Mfg. Co. v. Hittredge & Co., 242 Ill. 88. As the trial was by the court, we must assume that this evidence was disregarded. In absence of any express provision in the written agreement as to the time when the sign was to be finished, the law would imply an agreement that it should be completed within a reasonable time, and parol evidence was inadmissible to show a different express agreement. Union Special Sewing Machine Co. v. Lockwood, 110 Ill. App. 387, and cases there cited.

There was uncontradicted evidence to the effect that upon the execution of the written agreement plaintiff began work on the sign; that it had been completed and only awaited the drying of the paint until it would have been erected; in fact, that it would have been put up on the following day if defendant had not cancelled the order. There was also evidence from which the trial court could

have found that this would have been a reasonable time in which to complete the work to be done. The evidence was to the effect that the work after it was begun was continued thereafter every day except Sundays and holidays intervening. There was also evidence from which the court might have found that assuming the provision of the contract to be that the sign should be erected by June 1st, and that time was of the essence of the contract and assuming that default had been made by plaintiff in performance, the provision had been waived through defendant, with knowledge, permitting the work to proceed after that date.

The law being as heretofore stated, the issues of fact were for the court, and it is not argued that the damages allowed are excessive assuming plaintiff had a right to recover. The judgment of the trial court is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

37484

CAROLAN, GRAHAM & HOFFMAN,
INC., a Corporation,
Defendant in Error,

vs.

FRED I. SIMON,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

278 I.A. 6257

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on contract and upon trial by the court there was a finding for plaintiff with judgment thereon for \$494.97, which defendant seeks to reverse, contending that the court erred in entering judgment for plaintiff and overruling the motion of defendant for a new trial and in arrest of judgment. It is also urged that the judgment is excessive and against the manifest weight of the evidence.

The evidence tends to show that plaintiff was engaged in the insurance brokerage business and defendant was employed by it to solicit business. Plaintiff alleges, while defendant denies, that the agreement between the parties was that defendant should become personally liable for the unpaid premiums which should accrue on certain policies of insurance he was instrumental in placing.

The statement of claim avers that plaintiff caused policies of insurance to be issued at the request of defendant for which defendant promised to pay the premiums, and that he has failed to pay them. The affidavit of merits avers that plaintiff acted solely as a broker and was entitled in these transactions to receive only its commission; that the premiums upon the policies were paid to the insurance companies; that the agreement was that defendant should pay these premiums upon policies placed by him when he collected from his clients, deducting his own commissions and remitting the balance to plaintiff; that it was further agreed that when policies

were cancelled (no premium having been paid thereon) neither plaintiff nor defendant would receive a commission. The affidavit denies that defendant was indebted to plaintiff for the amount alleged in its statement, or for any other sum.

The evidence tends to show that defendant was employed by plaintiff in 1923 as a solicitor of insurance upon a commission basis and that he continued this relationship until 1927. The evidence fails to show any original promise by defendant to pay the premiums on insurance policies obtained by his solicitation and issued to customers. A large number of exhibits were offered by defendant and received in evidence. These exhibits tend to show the usual practice in dealings between plaintiff and its customers, but do not indicate that defendant was charged with premiums as an original promisor. There is no evidence in the record tending to sustain that theory.

Mr. Graham, president and treasurer of plaintiff, testified as to the manner in which the business was conducted and showed the business to be one of general insurance business agency, sometimes getting business direct from customers and at other times through brokers. He said that the arrangement as to the employment of defendant was made through Mr. Cook, the vice-president of plaintiff.

Mr. Cook testified that he employed defendant and that "the commission was to be deducted when the items were paid to us." He did not give testimony tending to show that defendant had agreed to be liable for premiums in the first instance. He said, however, that in 1926 defendant procured the business of the B. Manischewitz Co., and that defendant several times stated to him that he would "guarantee" any account arising from that business; that "Mr. Simon volunteered the information that he would guarantee the account of Manischewitz." He first said the promise to guarantee was made by defendant "several times;" later he limits this promise to one

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occasion. His testimony on this point is vague and uncertain and is positively denied by defendant. The evidence shows that defendant's father was the general manager of the business, which had to do with the manufacture of matzos for use at Easter time, which defendant says "was a sort of unleavened bread, manufactured at that time for Jews."

Without going into the evidence in detail, we think it appears from plaintiff's correspondence with defendant, together with other evidence in the case, that there was a controversy concerning this account; that defendant tendered a check for the amount due, except certain items, which plaintiff refused to accept; that thereupon the insurance was cancelled. It appears that other items in dispute were paid by defendant. To summarize, there is no proof tending to show the agreement alleged in the statement of claim; the vague testimony of Mr. Cook as to the alleged guaranty is denied by defendant, and the documentary evidence indicates that even accepting the theory that defendant had guaranteed the Manischewitz account, nothing is due plaintiff from defendant thereon.

We regret the necessity of considering the record without the aid of a brief by plaintiff. We find as a matter of fact that defendant, Fred I. Simon, is not indebted to plaintiff in any sum whatsoever upon the claims averred in plaintiff's statement of claim.

For the reasons indicated the judgment is reversed with a finding of fact and judgment here.

REVERSED WITH FINDING OF FACT.

O'Connor, P. J., and McSweeney, J., concur.

37544

MIKE DELICH,
Defendant in Error,
vs.
FRED WOLF and ELMER WOLF,
Plaintiffs in Error.

29
F
ERROR TO CIRCUIT COURT
OF COOK COUNTY.

273 I.A. 626¹

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Defendants, Fred and Elmer Wolf, seek to reverse a judgment entered against them on April 29, 1932, for the sum of \$10,000 in an action on the case and upon the verdict of a jury. The record shows the following:

The praecipe in the case was filed September 5, 1929, with a demand for a jury trial. Summons issued which was returned served on defendant Fred Wolf and as to Elmer Wolf not found. October 21, 1929, the appearance of both defendants was entered by Goodman, an attorney. November 8, 1929, plaintiff filed a declaration in one count. November 19, 1929, defendant Fred Wolf filed a plea of the general issue and on the same day Elmer Wolf filed a plea of the general issue and a further plea denying ownership of the motor vehicle which was alleged to have caused the injury. Notice to place the cause on the trial calendar was filed June 6, 1931, and on motion of plaintiff the cause was stricken from the trial call on December 17, 1931. Notice to place the cause on the trial calendar was served by attorney for plaintiff upon attorney for defendants January 6, 1932, and filed in court on January 11, 1932.

January 21, 1932, Elmer A. Johnson, theretofore representing plaintiff, withdrew his appearance with the consent of defendants. There was another notice to place the cause upon the trial calendar which appears to have been mailed to defendants by Elmer A. Johnson February 12, 1932, and this notice was filed in court February 15, 1932. With the consent of plaintiff on April 29, 1932, Elmer A.

37544

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Defendant, Fred and Ethel Wolf, were indicted on January 1, 1933, for the murder of Edward G. Bremer. The record on action on the case and upon the arrest of a party. The record shows the following:

The record in the case was filed December 1, 1932, with a demand for a jury trial. The record shows that the defendant, Fred Wolf, was arrested on December 1, 1932, and was held in the Chicago House of Detention.

On October 21, 1932, the defendant, Fred Wolf, was arraigned on the charge of murder. The record shows that the defendant, Fred Wolf, was arraigned on the charge of murder.

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Johnson withdrew as attorney for plaintiff and E. J. Hauflaire entered his appearance. The order, after providing for the substitution of attorneys, also provides:

"Thereupon comes the plaintiff to this suit by his attorney and it appearing to the Court that due personal service of process of summons issued in said cause has been had on the defendants for at least ten days before the first day of this term, and they being now here three times solemnly called in open court come not nor does any person for them, but herein they make default which is on motion of the plaintiff's attorney ordered to be taken and the same is hereby entered herein of record for want of an appearance and plea filed in said cause.

Wherefore the plaintiff ought to have and recover of and from the defendant his damages sustained herein by reason of the premises."

The record further recites that on April 29, 1932, upon motion of plaintiff, defendants "were theretofore defaulted and thereupon the matter was given to assess" plaintiff's damages, whereupon a verdict was rendered in accordance with the declaration for the sum of \$10,000 against defendants; that "judgment was entered upon said verdict, together with costs and charges, and that an execution issue therefor."

Defendants contend that the judgment should be reversed because the declaration does not state a cause of action against Elmer Wolf. The declaration was in a single count, which, in substance, alleged that on November 8, 1928, Elmer Wolf was the owner and in possession of an automobile in the city of Blue Island; that on that day "Fred Wolf was propelling, operating and maintaining said automobile owned by Elmer Wolf in a southerly direction on Western avenue, a public street and highway in the City of Blue Island." After averring that plaintiff was in the exercise of due caution, the declaration proceeds to aver that "said defendants then and there so carelessly and negligently propelled, operated and maintained their said automobile that by and through the carelessness and negligence of said defendants," the said automobile collided with plaintiff, etc.

Defendant Elmer Wolf says that this declaration alleges no duty on his part; that it does not aver that he was in the automo-

Johnson withdrew as attorney for plaintiff and J. V. ...
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The record further recites that on April 22, 1904, ...
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Defendant Elmer Wolf says that this declaration alleges no
 duty on his part; that it does not state that he was the author-

bile or operating it, or that it was being operated by his servant or agent. On the contrary, such fact is negatived (he says) by the allegation that Fred Wolf was propelling, operating and maintaining the automobile owned by Elmer Wolf. The further allegation that "defendants" carelessly and negligently propelled, operated, etc., and by and through the negligence "of said defendants" ran into and collided with plaintiff, is not, says defendant Elmer Wolf, an allegation that he was operating the automobile at the time in question but only and merely the conclusion of the pleader.

L.S. & E.R.Co.,

Chicago City Ry. Co. v. Jennings, 157 Ill. 274; McAndrews v. Chicago, / 222 Ill. 232; Lincoln Park Coal Co. v. Wabash Ry. Co., 338 Ill. 82; Kovell v. North Roseland Motor Sales, 275 Ill. App. 566, and Paris v. East St. Louis Ry. Co., 275 Ill. App. 241, are cited.

We do not doubt that the declaration is deficient and that if a demurrer had been interposed it must have been sustained. Plaintiff however, invokes the rule that after judgment the rule that pleadings are to be construed most strongly against the pleader is reversed, and that the pleading is then liberally construed for the purpose of sustaining the judgment, and he also invokes the well known rule that where there is any defect, imperfection or omission in any pleading which would have been fatal on demurrer, yet if the issue joined is such as necessarily to require on the trial proof of the facts so defectively stated or omitted, then such defect is cured by verdict. This is in substance the classic statement as found in Chitty on Pleading, vol. 1, 673, and substantially restated in the many Illinois cases, such as Sargent Co. v. Baublis, 215 Ill. 423. That rule, however, is not applicable to this record for the reason that it discloses that the issues were never in fact submitted to the jury. On the contrary, the record shows that the appearance and pleas of defendants were disregarded; that defendants were solemnly called and their default entered, and the case referred to the jury for assessment

of damages, the liability of both defendants being assumed. In other words, the record shows that the judgment rests upon an order of default which ought not to have been and could not have been properly entered. The judgment therefore cannot stand.

American Mail Order Co. v. Marsh, 118 Ill. App. 248; Watson v. Tring, 274 Ill. App. 379; Henning v. Sampsell, 236 Ill. 375.

This matter was considered upon oral argument, and plaintiff at that time raised the point that this contention was first clearly made in the reply brief by defendants and therefore under the rules of this court should not receive consideration. At plaintiff's request, leave to file a brief replying to the reply brief of defendants was given, and this was done. It is not seriously contended that the judgment was not erroneously entered, but defendants urge the point that this contention should not be considered because, as it is said, it was raised only in the reply brief, and it is insisted that this was contrary to rule 10 of this court which should be applied. The declaration in this case, as already pointed out, states a doubtful case as to one of the defendants. The rule in question is directory and its enforcement within the discretion of the court to the end that justice may prevail. The Supreme court of this state in People v. Donahoe, 279 Ill. 411, has held that such rule will not be enforced where the tendency might be to promote an injustice. For that reason, we think it should not be here applied.

The reply brief of plaintiff also insists that in order to support the judgment this court should exercise the power conferred by section 7 of the statute of Amendments and Joefails (Cahill's Ill. Rev. Stats., chap. 7, sec. 7, p. 94). The submission of this case to the jury upon issues other than those arising upon the pleadings is a substantial injustice which renders the provisions of that statute inapplicable.

For the reasons stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

37670

ETHEL ESKRIDGE,
Appellee,

vs.

CITY OF CHICAGO, a
Municipal Corporation,
Appellant.

30 17
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

273 I.A. 626²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The City appeals from a judgment in favor of plaintiff in the sum of \$1500 entered upon the verdict of a jury in an action on the case for personal injuries.

The declaration, which was in two counts, averred that on March 4, 1926, plaintiff, a pedestrian, was at the northeast corner of the intersection of Halsted and 79th streets; that the City had negligently suffered the sidewalk at that place to be, remain and continue in an unsafe and dangerous condition, in that the stone or cement with which it was built had become chipped off, broken and removed; that by reason of this negligence of defendant, plaintiff while walking on the sidewalk with due care unavoidably slipped and fell into the gutter, thereby catching her foot and causing her to fall with great force and violence, whereby she was greatly hurt, etc.

Plaintiff has not appeared in this court to support the judgment.

It is contended in behalf of the City that the defect in the sidewalk was latent and unseen and that there was no evidence tending to show actual or constructive notice to the City, and cases are cited to the effect that there can be no recovery under such circumstances. If the evidence as abstracted were accepted it would probably be necessary to sustain this contention, but the record shows evidence by the witness, Philip Croake, to the effect that he was familiar with the intersection of 79th and Halsted streets (having worked in that neighborhood for ten years), during which time he had passed over the

STILL HONORABLE,
MAYOR

VS.

CITY OF CHICAGO, A
Municipal Corporation,
Plaintiff.

IN JUDICIAL PROCEEDINGS IN THE COURT OF THE CITY.

The City of Chicago, Plaintiff, vs. the City of Chicago, Defendant.

The City of Chicago, Plaintiff, vs. the City of Chicago, Defendant.

on the case of personal injuries.

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March 4, 1925, Plaintiff, vs. Defendant, the City of Chicago, Defendant.

of the information at Chicago, the City of Chicago, Defendant.

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Plaintiff has not answered in this case to report the

judgment.

It is contained in the City of Chicago, Defendant.

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by the witness, Philip Gross, to the effect that he was familiar with

the intersection of 7th and LaSalle streets (having worked in that

neighborhood for ten years), during which time he had passed over the

intersection daily. He says that the defective condition of the sidewalk was visible and had existed for several years and at the particular place where the accident occurred for thirty days. The City was therefore charged with constructive notice. Boender v. City of Harvey, 251 Ill. 228; Graham v. City of Chicago, 346 Ill. 643.

We have also given consideration to the further contention of the City that the verdict and judgment are against the manifest weight of the evidence. It will be unnecessary on the record to review the evidence at length. That given in behalf of plaintiff tends to show that she was severely injured at the time alleged by a part of the defective sidewalk giving away; and medical testimony was produced tending to show that her injuries were permanent. The uncontradicted evidence tends to show that after the injury occurred on March 4, 1926, she was assisted by others from the gutter into which she fell, was taken home in a cab and did not go out of the house thereafter until June 28th. It also shows that plaintiff's knee was severely injured; that it would slip out of joint, and that the kneecap would have to be pushed back into place; that plaintiff wears an artificial kneecap; that she wore it without taking it off for two years and continues to wear it when her knee is sore. Indeed, defendant does not contend that the amount allowed by the jury is excessive. Moreover, the evidence produced by plaintiff is uncontradicted. No occurrence witness was produced by the City and no medical or other testimony was offered in its behalf.

Complaint is made of plaintiff's instruction No. 11, by which the jury was told that in determining the amount of damages plaintiff was entitled to recover, if any, it should take into consideration all of the facts pertaining to her physical injuries so far as proved by a preponderance of the evidence, the nature and extent of such injuries, if any, "her suffering in body and mind, if any, directly resulting from such physical injuries," etc. It is

intersection daily. He says that the defective condition of the sidewalk was visible and had existed for several years and in the particular place where the accident occurred for many years. The city was therefore charged with constructive notice. Bohannon v. City of Harvey, 201 Ill. 592; 202 Ill. 593; 203 Ill. 594.

It has also been held that the verdict was against the weight of the evidence. It will be unnecessary on the record to review the evidence at length. It is given in detail of plaintiff's claim to show that she was severely injured at the time of the accident by a part of the defective sidewalk giving away; and medical testimony was produced tending to show that her injuries were permanent. The uncontradicted evidence tends to show that after the injury occurred on March 4, 1926, she was assisted by others from the gutter into which she fell, was taken home in a cab and did not go out of the house thereafter until June 28th. It also shows that plaintiff's knee was severely injured; that it would slip out of joint, and that the knee cap would have to be pushed back into place; that plaintiff wears an artificial knee; that she wore it without taking it off for two years and continued to wear it when her knee is sore. Indeed, defendant does not contend that the amount allowed by the jury is excessive. Moreover, the evidence produced by plaintiff is uncontradicted. No occurrence witness was produced by the city and no medical or other testimony was offered in its behalf.

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urged that this instruction was erroneous because, in addition to referring to suffering plaintiff sustained in body, it referred to her suffering in mind. The instruction is one which has often been given, and no case in which it has been criticized or held erroneous is cited. It was in part covered by another instruction, but even if unnecessary the giving of it was not reversible error.

The evidence is uncontradicted and shows an unquestioned liability. It is not contended that the amount allowed is excessive, and we find no reversible error in the record.

The judgment is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

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 one is cited. It was in fact based on the evidence of the
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 The evidence is not sufficient and must be considered
 liability. It is not concluded that the evidence is sufficient,
 and we find no reversible error in the finding.
 The judgment is therefore affirmed.

Reversed.

O'Connor, J. J., and McGowan, J. J., concur.

37760

SAMUEL HECKER,
Appellee.

vs.

CAN & GENERAL INSURANCE CORPORATION,
LTD., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

275 1.A. 626³

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In a suit for indemnity upon a burglary insurance policy and upon trial by the court there was a finding for plaintiff in the sum of \$2130, with judgment, which defendant asks us to reverse. Plaintiff assigns as cross error that interest upon the amount of the claim was not included in the amount of the judgment.

The evidence tends to show that March 4, 1932, defendant issued its written policy agreeing to indemnify plaintiff to the amount of \$4900 against loss by burglary, larceny, etc., of property situated at 3756 Agatite street in Chicago. The policy states:

"This agreement is subject to the following conditions:

The statements in Items numbered 1 to 13 inclusive in the Declarations hereinafter contained are declared by the Assured to be true. This policy is issued in consideration of such statements and the payment of the total premium in the Declarations expressed."

Item 12 of the Declarations is as follows:

"The assured has not sustained, nor received indemnity for, any loss or damage by burglary, robbery or theft within the last five years, except as herein stated; no exceptions."

The uncontradicted testimony is to the effect that this statement in item 12 is untrue and that the insured had sustained such losses. The evidence for plaintiff tends to show that he negotiated for the policy through A. F. Jacobs, a life insurance agent, and that plaintiff informed Jacobs at that time of the prior losses; that Jacobs obtained the policy from a broker named Shollar, and that Jacobs informed him of the prior losses. There is also testimony tending to show that one Frenz received the order for the policy in question from Shollar; that Frenz applied to Grams-Landt

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U.S. DEPARTMENT OF THE ARMY
HEADQUARTERS, WASHINGTON, D.C.

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THE UNIVERSITY OF CHICAGO

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& Co., who was the general agent of defendant, and obtained the policy through it. Cramsie-Laadt & Co. was not, so far as the evidence indicates, informed as to the prior loss, and we think the evidence in the record fails to establish that either Shollar or Jacobs were employed by or connected with Cramsie-Laadt & Co., or defendant, in any way so as to make the knowledge of Shollar and Jacobs binding upon defendant, and it is not contended otherwise by plaintiff in his brief. Questions put to Frenz as to his knowledge of plaintiff's prior loss were objected to and the objection erroneously sustained, but no point is made on this.

The evidence shows the payment of the premium by check of plaintiff for \$96.88 to the order of Jacobs under date of April 23, 1932. The evidence further shows that on April 8, 1932, the insured sustained loss through the burglary of his home and the theft of personal property of a value equal to the amount for which judgment was rendered. The previous loss occurred in February, 1932, and for that loss plaintiff had no coverage. Plaintiff says that he never read the policy and that if he had understood that this declaration was in it he would not have accepted it.

Peter Schoenberg, an adjuster for the defendant insurance corporation, testifies that plaintiff and Mrs. Hecker came to his office after the loss, and that he personally took from them a notice of loss, which is in writing and appears in evidence as Plaintiff's Exhibit 3. In later evidence (given after the pleadings in the case had been so amended as to raise an issue of waiver) Mr. Schoenberg testified that the date of this interview was April 18, 1934; that plaintiff came on the following day with bills requested by him; that he then advised plaintiff that there had been a violation of the contract inasmuch as plaintiff had sustained a prior loss, and that the witness rescinded the contract for defendant and offered to return to plaintiff \$96.88 in currency, the whole amount

of premium paid on the policy. This evidence is denied by plaintiff. This conflicting evidence raised an issue of fact which the court decided in favor of plaintiff. As already stated, this evidence of Schoenberg was not given until after the pleading had been amended. Not only is it denied by plaintiff but there is written evidence in the case inconsistent with it.

It appears that on June 16, 1932, defendant, by Cransie-Laadt & Co., caused a written notice of cancellation of the policy to be mailed to plaintiff. This notice appears in evidence as Plaintiff's Exhibit 13 and is as follows:

"Dear Sir:

This corporation hereby notifies you that it elects to cancel its Policy No. 4399 in accordance with the terms and conditions therein provided. Said policy was issued to you through its Agency at Chicago, Ill.

In accordance with the conditions referred to all liability of this Corporation under this policy will cease and terminate at the expiration of five days from the receipt by you hereof. Check for Return premium of \$67.15 is enclosed."

On June 21, 1932, plaintiff replied in substance that he was returning the check for \$67.15, which was delivered to him June 18, 1932. He added:

"You have made a serious mistake in your remittance as my claim against you amounts to \$2,310.62, being the amount of my claim under this insurance policy.

Will you kindly forward me your check in the above amount, and I will be very glad to close this matter."

Defendant's agent Schoenberg, it seems, had an interview with plaintiff on October 24, 1932, and there is a written exhibit in evidence corroborating his testimony of an offer to return the whole amount of the premium to plaintiff on that date. This writing, however, (which is defendant's Exhibit 1) tends very much to discredit Schoenberg's testimony; ^{that} he disclaimed liability for defendant under the policy and offered to return the premium in April. The exhibit is an unsigned receipt prepared by defendant and presented to plaintiff for execution. A notation thereon states: "Policy cancelled 6/21/32," and another part of it reads as follows:

"Received of the Car and General Insurance Corporation, Ltd., by its agent, P. M. Schoenberg, the above captioned currency being return premium on policy which was cancelled as of June 21, 1932."

Further corroboration as to the time and manner of this cancellation is found in a letter from the manager of the defendant corporation to Crasie-Landt & Co., its general agent, dated May 17, 1932.

It reads:

"On account of unfavorable experience, we must ask for the rescission of the above policy at your earliest convenience. You will accordingly return premium to the assured. Thanking you in advance for giving this your prompt attention, we remain,

Yours very truly"

These written documents make it quite impossible to believe the testimony of Schoenberg and his assistant Hoeger that the policy was rescinded with an offer to return the entire premium on April 18th, when the agents of defendant first learned that plaintiff had sustained losses prior to the time he took out the policy. On the contrary, this evidence shows beyond reasonable doubt that defendant after learning the facts proceeded to cancel the policy for the remainder of the term for which it was issued and enclosed a check for the premium for the remainder of the term, which plaintiff refused to accept. On this evidence the court could properly hold that the condition as to prior losses was waived with knowledge. As the notice only purported to cancel the policy as of June 21, 1932, defendant by necessary inference admits that the policy was valid and in force prior to that date and at the time the loss was sustained. That an effort to cancel a policy of insurance is an implied recognition of its enforceability prior to the date of cancellation, seems to have been held in a number of well considered cases cited in plaintiff's brief. Citizens Ins. Co. v. Halbig, 138 Ill. App. 115; Young v. Union Life Ins. Co., 202 Ill. App. 321; Middleton v. North American Protective Assoc., 260 Ill. App. 283. Other cases hold that when an insurer with full knowledge while the risk is pending does any act recognizing the continued validity of the

"I am not a Communist," said the man, "I am a worker."

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1. The Commission has received information that the following persons have been identified as having been involved in the activities of the Communist Party, U.S.A., in the United States:

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the test of whether the proposed revision is a "substantial" improvement.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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DATE: 10/10/1964

CONFIDENTIAL

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100-443887-1000

has filed for Chapter 11 protection in federal court.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

to have been a part of a number of well organized groups listed in

1015. 1016. 1017. 1018. 1019. 1020. 1021. 1022. 1023. 1024. 1025. 1026. 1027. 1028. 1029. 1030. 1031. 1032. 1033. 1034. 1035. 1036. 1037. 1038. 1039. 1040. 1041. 1042. 1043. 1044. 1045. 1046. 1047. 1048. 1049. 1050. 1051. 1052. 1053. 1054. 1055. 1056. 1057. 1058. 1059. 1060. 1061. 1062. 1063. 1064. 1065. 1066. 1067. 1068. 1069. 1070. 1071. 1072. 1073. 1074. 1075. 1076. 1077. 1078. 1079. 1080. 1081. 1082. 1083. 1084. 1085. 1086. 1087. 1088. 1089. 1090. 1091. 1092. 1093. 1094. 1095. 1096. 1097. 1098. 1099. 1100. 1101. 1102. 1103. 1104. 1105. 1106. 1107. 1108. 1109. 1110. 1111. 1112. 1113. 1114. 1115. 1116. 1117. 1118. 1119. 1120. 1121. 1122. 1123. 1124. 1125. 1126. 1127. 1128. 1129. 1130. 1131. 1132. 1133. 1134. 1135. 1136. 1137. 1138. 1139. 1140. 1141. 1142. 1143. 1144. 1145. 1146. 1147. 1148. 1149. 1150. 1151. 1152. 1153. 1154. 1155. 1156. 1157. 1158. 1159. 1160. 1161. 1162. 1163. 1164. 1165. 1166. 1167. 1168. 1169. 1170. 1171. 1172. 1173. 1174. 1175. 1176. 1177. 1178. 1179. 1180. 1181. 1182. 1183. 1184. 1185. 1186. 1187. 1188. 1189. 1190. 1191. 1192. 1193. 1194. 1195. 1196. 1197. 1198. 1199. 1200. 1201. 1202. 1203. 1204. 1205. 1206. 1207. 1208. 1209. 1210. 1211. 1212. 1213. 1214. 1215. 1216. 1217. 1218. 1219. 1220. 1221. 1222. 1223. 1224. 1225. 1226. 1227. 1228. 1229. 1230. 1231. 1232. 1233. 1234. 1235. 1236. 1237. 1238. 1239. 1240. 1241. 1242. 1243. 1244. 1245. 1246. 1247. 1248. 1249. 1250. 1251. 1252. 1253. 1254. 1255. 1256. 1257. 1258. 1259. 1260. 1261. 1262. 1263. 1264. 1265. 1266. 1267. 1268. 1269. 1270. 1271. 1272. 1273. 1274. 1275. 1276. 1277. 1278. 1279. 1280. 1281. 1282. 1283. 1284. 1285. 1286. 1287. 1288. 1289. 1290. 1291. 1292. 1293. 1294. 1295. 1296. 1297. 1298. 1299. 1300. 1301. 1302. 1303. 1304. 1305. 1306. 1307. 1308. 1309. 1310. 1311. 1312. 1313. 1314. 1315. 1316. 1317. 1318. 1319. 1320. 1321. 1322. 1323. 1324. 1325. 1326. 1327. 1328. 1329. 1330. 1331. 1332. 1333. 1334. 1335. 1336. 1337. 1338. 1339. 1340. 1341. 1342. 1343. 1344. 1345. 1346. 1347. 1348. 1349. 1350. 1351. 1352. 1353. 1354. 1355. 1356. 1357. 1358. 1359. 1360. 1361. 1362. 1363. 1364. 1365. 1366. 1367. 1368. 1369. 1370. 1371. 1372. 1373. 1374. 1375. 1376. 1377. 1378. 1379. 1380. 1381. 1382. 1383. 1384. 1385. 1386. 1387. 1388. 1389. 1390. 1391. 1392. 1393. 1394. 1395. 1396. 1397. 1398. 1399. 1400. 1401. 1402. 1403. 1404. 1405. 1406. 1407. 1408. 1409. 1410. 1411. 1412. 1413. 1414. 1415. 1416. 1417. 1418. 1419. 1420. 1421. 1422. 1423. 1424. 1425. 1426. 1427. 1428. 1429. 1430. 1431. 1432. 1433. 1434. 1435. 1436. 1437. 1438. 1439. 1440. 1441. 1442. 1443. 1444. 1445. 1446. 1447. 1448. 1449. 1450. 1451. 1452. 1453. 1454. 1455. 1456. 1457. 1458. 1459. 1460. 1461. 1462. 1463. 1464. 1465. 1466. 1467. 1468. 1469. 1470. 1471. 1472. 1473. 1474. 1475. 1476. 1477. 1478. 1479. 1480. 1481. 1482. 1483. 1484. 1485. 1486. 1487. 1488. 1489. 1490. 1491. 1492. 1493. 1494. 1495. 1496. 1497. 1498. 1499. 1500. 1501. 1502. 1503. 1504. 1505. 1506. 1507. 1508. 1509. 1510. 1511. 1512. 1513. 1514. 1515. 1516. 1517. 1518. 1519. 1520. 1521. 1522. 1523. 1524. 1525. 1526. 1527. 1528. 1529. 1530. 1531. 1532. 1533. 1534. 1535. 1536. 1537. 1538. 1539. 1540. 1541. 1542. 1543. 1544. 1545. 1546. 1547. 1548. 1549. 1550. 1551. 1552. 1553. 1554. 1555. 1556. 1557. 1558. 1559. 1560. 1561. 1562. 1563. 1564. 1565. 1566. 1567. 1568. 1569. 1570. 1571. 1572. 1573. 1574. 1575. 1576. 1577. 1578. 1579. 1580. 1581. 1582. 1583. 1584. 1585. 1586. 1587. 1588. 1589. 1590. 1591. 1592. 1593. 1594. 1595. 1596. 1597. 1598. 1599. 1600. 1601. 1602. 1603. 1604. 1605. 1606. 1607. 1608. 1609. 1610. 1611. 1612. 1613. 1614. 1615. 1616. 1617. 1618. 1619. 1620. 1621. 1622. 1623. 1624. 1625. 1626. 1627. 1628. 1629. 1630. 1631. 1632. 1633. 1634. 1635. 1636. 1637. 1638. 1639. 1640. 1641. 1642. 1643. 1644. 1645. 1646. 1647. 1648. 1649. 1650. 1651. 1652. 1653. 1654. 1655. 1656. 1657. 1658. 1659. 1660. 1661. 1662. 1663. 1664. 1665. 1666. 1667. 1668. 1669. 1670. 1671. 1672. 1673. 1674. 1675. 1676. 1677. 1678. 1679. 1680. 1681. 1682. 1683. 1684. 1685. 1686. 1687. 1688. 1689. 1690. 1691. 1692. 1693. 1694. 1695. 1696. 16

Figure 1: Schematic representation of the experimental design. The figure shows a sequence of events for two groups: 'Light delay' and 'No delay'. In the 'Light delay' group, a light is shown with a delay before the subject responds. In the 'No delay' group, the subject responds immediately. The sequence includes a light stimulus, a response, and a reward. The 'Light delay' group shows a longer interval between the light and the response compared to the 'No delay' group.

[1](#) [2](#) [3](#) [4](#) [5](#) [6](#) [7](#) [8](#) [9](#) [10](#) [11](#) [12](#) [13](#) [14](#) [15](#) [16](#) [17](#) [18](#) [19](#) [20](#) [21](#) [22](#) [23](#) [24](#) [25](#) [26](#) [27](#) [28](#) [29](#) [30](#) [31](#) [32](#) [33](#) [34](#) [35](#) [36](#) [37](#) [38](#) [39](#) [40](#) [41](#) [42](#) [43](#) [44](#) [45](#) [46](#) [47](#) [48](#) [49](#) [50](#) [51](#) [52](#) [53](#) [54](#) [55](#) [56](#) [57](#) [58](#) [59](#) [60](#) [61](#) [62](#) [63](#) [64](#) [65](#) [66](#) [67](#) [68](#) [69](#) [70](#) [71](#) [72](#) [73](#) [74](#) [75](#) [76](#) [77](#) [78](#) [79](#) [80](#) [81](#) [82](#) [83](#) [84](#) [85](#) [86](#) [87](#) [88](#) [89](#) [90](#) [91](#) [92](#) [93](#) [94](#) [95](#) [96](#) [97](#) [98](#) [99](#) [100](#)

policy, such act will amount to the waiver of the forfeiture for the breach, and such seems to be the rule laid down in Williamsburg C. F. Ins. Co. v. Cary, 83 Ill. 453; Schimp v. Cedar Rapids Ins. Co., 124 Ill. 354; Germania Fire Ins. Co. v. Hick, 125 Ill. 361. That such waiver may take place after loss as well as before, has been held in Cox v. American Ins. Co., 184 Ill. App. 419; Phoenix Ins. Co. v. Tomlinson, 125 Ind. 84. As against the rule stated in these cases, defendant relies on Seaback v. Metropolitan Life Ins. Co., 274 Ill. 316, - a case which is, we think, clearly distinguishable both as to the provisions of the insurance policy and as to other facts which appear in the case. The condition of the policy there violated was one which the policy expressly declared would make it void and forfeit all premiums paid to the insurance company. In other words, the policy there considered was, as the facts tended to show, void ab initio.

It is also urged that there could be no waiver in the instant case because of a provision in the insurance policy to the effect that a forfeiture could not be waived except by agreement signed by certain officials of the company. It has been held, however, in many cases that a provision of that kind is for the benefit of the company, and that notwithstanding such provision a general agent has power to waive by act or conduct. Bennett v. Union Central Life Ins. Co., 203 Ill. 439; Freise v. Metropolitan Life Ins. Co., 206 Ill. App. 404; Metropolitan Life Ins. Co. v. Sullivan, 112 Ill. App. 500. As to the power of a general agent binding the insurance company in such cases, see Continental Casualty Co. v. Johnson, 119 Ill. App. 93; John Hancock Mutual Life Ins. Co. v. Schlink, 175 Ill. 234.

We think the law applicable to this case is well settled. There was a clear, definite issue of fact as to the time when, and circumstances under which, defendant undertook to rescind the policy, and the finding of the court on that issue of fact is entitled in

this court to the same weight as the verdict of a jury. People v. C. & E. I. Ry. Co., 258 Ill. App. 535; Israel v. Selman, 263 Ill. App. 351; Bird v. Lauer, 272 Ill. App. 522.

Defendant has argued at length that the court erred in admitting Plaintiff's Exhibit 13 in evidence. That was perhaps technically true, as the pleadings stood at the time the exhibit was first offered, the issue of waiver not having then been raised in the case. However, the pleadings were afterward amended so as to raise the issue, and it is, we think, unnecessary to cite authorities to the proposition that amendments before judgment are always proper in the discretion of the court, in order that the proof may correspond to the pleadings. Wood v. Louisville & Nashville R. R. Co., 183 Ill. App. 543; Franko v. Manley, 215 Ill. 216.

Plaintiff contends, on the authority of Waernes v. Independent Order of Foresters, 244 Ill. App. 211; Little v. Ill. Bankers, 247 Ill. App. 547, that interest should have been allowed upon the amount found due. In view, however, of the unliquidated character of this claim, we think the court properly declined to include interest. Maremont, Wolfson & Cohen Co. v. Schwarzschild & Sulzbarger Co., 194 Ill. App. 619; Laughlin v. Hopkinson, 292 Ill. 80.

Plaintiff heretofore filed a motion to strike the bill of exceptions in this case, which motion was denied, but is reargued in the briefs. That question is settled by our former ruling.

There is no reversible error in the record, and the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

37788

WILLIAM L. O'CONNELL, Receiver of
The West Side Trust & Savings
Bank of Chicago, a Corporation,
Appellee,

vs.

A. MILLER, I. MILLER and D.J. WALKIN,
Appellants.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

278 I.A. 626⁴

MR. JUSTICE WATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment in the sum of \$7000 entered upon the verdict of a jury as instructed by the court. The action was in assumpsit and based upon a written guaranty by defendants of a promissory note. The amended declaration contained a special count which described the note and guaranty, and to this special count the common counts were attached.

The special count as amended charged that the West Side Trust & Savings Bank, not personally but as trustee under the trust agreement dated August 24, 1928, known as Trust No. 23, upon the direction of defendants and others who were beneficiaries under the trust agreement, on July 24, 1928, made its principal promissory note, payable to bearer two years after date, for \$7150; that the note provided that it should be payable out of that portion of the trust estate specifically described in the trust agreement and draw interest at 6 per cent per annum before maturity, and that a trust deed conveying certain trust property described was executed and delivered for the purpose of securing the payment of this note; that the principal note and interest coupons attached were afterward for a valuable consideration delivered to the Schiff Mortgage & Investment Co.; that that company sold the note and trust deed to the Schiff Trust & Savings Bank; that the principal note matured on July 24, 1930; that interest up to that date was paid, but the principal was not; that on September 10, 1930, the note and the trust deed were sold to the Schiff Mortgage & Investment Co., and

WILLIAM I. O'CONNOR, Receiver of
The First National Bank
of Chicago, a corporation,
Chicago, Illinois.

A. MILLER, L. MILLER and J. MILLER,
Attorneys.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

This is an appeal by defendant from a judgment of the
of 1900 entered upon the verdict of a jury as returned by the
court. The action was to recover the sum of \$100,000 and
interest by defendant of a promissory note. The promissory
note contained a special clause which provided that the
payment, and so this special clause was made a part of the
note. The special clause provided that the sum of \$100,000
Trust a Savings Bank, not payable until the 1st day of
agreement dated August 24, 1900, from the Trust Co., was the
direction of defendant and to be paid to the beneficiary named in
trust agreement, on July 24, 1901, and the principal of the
note, payable to bearer two years after date, for which the
note provided that if there be no note on that date of the
trust estate specifically provided in the trust agreement and that
interest at 6 per cent per annum before maturity, and that a trust
deed conveyed certain property heretofore was conveyed and
delivered for the purpose of securing the payment of this note; that
the principal note and interest coupons attached were delivered to
a reliable person for delivery to the Trust Co. as a part of the
note Co.; that the company sold the note and trust deed to the
Trust Co. as a part of the note; that the principal note matured on
July 24, 1901; that interest on the note was paid, but the
principal was not; that on September 10, 1901, the note and the
trust deed were sold to the Trust Co. as a part of the note.

on that date there was paid on account of the principal of the note \$650, leaving a balance of \$6500; that this unpaid balance was extended by an extension agreement dated September 10, 1930, made between Schiff Mortgage & Investment Co. and defendants for one year from July 24, 1930, with interest at 6 per cent, payable monthly; that the extension was made upon the consideration that defendants, beneficiaries under Trust No. 23, would guarantee the payment of the note on July 24, 1931; that defendants guaranteed the payment of same in writing on the reverse side of the note, and that on September 10, 1930, Schiff Mortgage & Investment Co. sold the note and the trust deed to Schiff Trust & Savings Bank; that on February 1, 1931, Schiff Trust & Savings Bank sold the note and extension agreement to the West Side Trust & Savings Bank, which since that date has been the legal owner, holder and assignee of the note, trust deed and extension agreement; that an unpaid balance of \$6225 matured on July 24, 1931, and was not paid on that date; that the bank as legal owner and as trustee under the trust agreement entered into another extension agreement extending the maturity of the note of \$6225 to July 24, 1932, with interest at 6 per cent, payable monthly, and at 7 per cent after maturity; that the interest maturing on or before June 24, 1932, was paid; that the unpaid principal of \$6225 with interest from June 24, 1932, matured on July 24, 1932, and that these sums were guaranteed by defendants; that plaintiff was the bona fide legal owner and holder of the principal note, trust deed and extension agreement; that payment was requested from the parties liable, but that defendants have not paid the same.

A copy of the account sued on was attached with an affidavit that the sum of \$6225 with interest at 7 per cent from July 24, 1932, was due. A copy of the note was also attached to the declaration. On the reverse side of the note are two similar guaranties in writing. One of these is signed by defendant D. J. Malkin and the other by

on that date there was no record of the payment of the note
 1935, having a value of \$500; and this amount was not
 tented by an extension agreement dated December 22, 1935, which was
 between Society for the Advancement of the Negro Race, Inc., and the
 from July 22, 1935, with interest at 6 per cent, payable monthly;
 that the extension was made upon the condition that the
 beneficiaries were to be \$1.50, which was to be paid to the
 note on July 22, 1935; and that the extension was made on the
 same in relation to the payment of the note, and that on July 22,
 October 10, 1935, Society for the Advancement of the Negro Race, Inc.,
 the first was to deliver to the second a check for \$500, and
 1935, Society for the Advancement of the Negro Race, Inc., and the second
 went to the first with a check for \$500, and the first
 has been the legal owner, holder and assignee of the note, from
 deed and extension agreement; that on or about December 22, 1935, the
 turned on July 22, 1935, and was not paid on that date; and that
 deed on legal owner and as interest thereon was paid a certain amount
 into another extension agreement extending the maturity of the note
 of \$500 on July 22, 1935, with interest at 6 per cent, payable
 monthly, and at 7 per cent after maturity; that the interest was
 on or before June 24, 1935, was paid; that the maturity of the
 \$500 was interest was due at 1935, matured on July 22, 1935,
 and that these were represented by witnesses; that plaintiff
 was the legal owner and holder of the principal note, that
 deed and extension agreement; that payment was received from the
 parties liable, but that defendant has not paid the same.
 1. Copy of the account used on was attached with an affidavit
 that the sum of \$500 was interest at 7 per cent from July 22, 1935,
 was due. A copy of the note was also attached to the declaration.
 On the reverse side of the note are two official signatures in ink.
 One of these is signed by defendant J. J. Kellie and the other by

defendants A. Miller and I. Miller. Each guaranty reads as follows:

"For value received the undersigned hereby guarantee the prompt payment of the within note at its maturity, and of all expenses incurred by the holder in collecting the same, including attorney's fees, and waive protest and notice of nonpayment, as well as diligence on the part of the holder thereof in collecting the same, and consent that security may be taken at the time of payment extended by the holder, without notice to the undersigned, and without impairing this guaranty."

Each defendant filed pleas of the general issue and a number of special pleas denying joint liability, etc. Demurrers were filed to some of these special pleas, which were sustained, the evidence was taken and at the close of the case a motion of defendants for an instructed verdict having been denied, the jury brought in a verdict for plaintiff as instructed by the court, upon which judgment was entered.

The suit proceeded to judgment in the name of William O'Connell as Receiver of the West Side Trust & Savings Bank of Chicago. On May 1, 1934, on motion of attorney for the Receiver an order was entered giving him leave to substitute himself as plaintiff. On May 2, 1934, an affidavit of the attorney for the Receiver was filed, averring that O'Connell on January 12, 1934, had been appointed Receiver for plaintiff by Edward J. Barrett, Auditor of Public Accounts for the State of Illinois.

The pleadings were not otherwise amended, and defendants contend that since there was no allegation in the declaration by way of amendment that O'Connell had been appointed Receiver or that the cause of action had vested in him, the court should have directed a verdict for defendants. The affidavit filed showed the appointment of O'Connell Receiver of the Bank under Section 11 of the General Banking Act of Illinois, and that appointment could not be collaterally attacked. People v. Dime Savings Bank, 350 Ill. 503. Section 54 of the Civil Practice Act, effective January 1, 1934, provides in substance that where there has been a transmission of interest

Notwithstanding the fact that the above information is being furnished to you for your information, it is not to be used for any purpose other than that for which it was furnished.

1. The first of these is the fact that the
2. government has been unable to maintain
3. a stable and effective system of
4. law and order. This is due to a
5. number of factors, including the
6. lack of a strong central authority,
7. the weakness of the judicial system,
8. and the prevalence of corruption.
9. The second major problem is the
10. economic situation. The country has
11. suffered from a long period of
12. economic stagnation, with high
13. unemployment and low living standards.
14. This has led to widespread poverty
15. and social unrest. The third major
16. problem is the ethnic and religious
17. tensions that have been a constant
18. feature of the country's history.
19. These tensions have often led to
20. violence and conflict, and have
21. made it difficult to build a
22. unified and stable nation.

[illegible][illegible]

in evidence that there has been a translation of letters
to or from the United States, effective January 1, 1944, by
any means, Exhibit A, Exhibit B, and Exhibit C, Section
Hoping not to mislead, and that applicant is not to collect
of 'General' and/or of the same order of the country
a variety of letters, the affidavit filed shows the applicant
the cause of action had been in him, the court would have elected
way of making the 'General' had been appointed Secretary of State
content that this letter was an affidavit in the possession by
at Washington with the affidavit attached, the letter at

or liability, or any person interested comes into existence after the beginning of an action, the action shall not abate, but that an order may be made that such person be made a party in substitution for, or in addition to, any other party, and that the cause or proceeding be carried on with the continuing parties, and such new parties "with or without a change in the title of the cause, on motion of anyone interested supported by affidavits, and such reasonable notice of the order to any new parties to be brought in as the court or tribunal may designate in such order."

As a matter of fact, in the instant case after the order permitting O'Connell to appear and prosecute the suit, his name was added to the title to the cause and in stipulation and otherwise throughout the litigation he was recognized as a party in interest. Under such circumstances we hold that the court did not err in denying defendants' motion to direct a verdict in their favor at the close of all the evidence for that reason.

Defendants next contend that the note described in the declaration and attached thereto was not a negotiable instrument because, they say, it does not contain an unconditional promise in writing to pay a certain sum of money absolutely and at all events. This contention we hold to be entirely immaterial. The obligation of defendants under the guaranty is not at all conditioned by the fact ~~that~~ (if it be a fact) that the obligation, the payment of which they guaranteed, was not technically a negotiable instrument.

Defendants also contend that the liability of a guarantor must be strictly construed and may not be extended by implication. They cite Shreffler v. Adelhoff, 133 Ill. 536; Burlington Ins. Co. v. Johnson, 120 Ill. 622; Cooper v. People, 85 Ill. 417, and they say that thus construed it was error for the court to instruct the jury to find against them for the amount due. The evidence shows without contradiction that the note was extended by the holder at

the request of defendants for the benefit of themselves and other beneficiaries, and whether construed strictly or liberally they are personally liable for the amount of the note with interest.

It is contended in the next place that as defendants did not sign jointly the same instrument they cannot be held jointly for the payment of the obligation guaranteed by them. In the absence of verified pleas, this contention cannot be sustained under the old practice (Stocker v. Leonard Machinery & Tool Co., 231 Ill. App. 206; Sears, Roebuck & Co. v. Wolf, 246 Ill. App. 550), and the present Civil Practice Act is more liberal as to joinder of parties defendant than the former law. (Cahill's Ill. Rev. Stats. 1933, chap. 110, secs. 152, 154, 172, pars. 24, 26, 44.)

The alleged errors urged by defendants are without substantial merit, and the judgment is therefore affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

37809

HATTIE R. COHEN,
Appellee,

vs.

PEGGY BYRNES, doing business
as JAUMA BEAUTY SALON,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

265 I.A. 626⁵

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$74 entered upon the finding of the court. The statement of claim averred that defendant conducted a beauty parlor in the city of Chicago and that plaintiff on February 19, 1932, entered the establishment for treatment; that while waiting she attempted to provide a light for herself and (manipulating the switch on the light) in the exercise of due care and caution, was injured.

The affidavit of merits generally denied the allegations of plaintiff's statement of claim and stated that defendant was without knowledge of the acts alleged. Plaintiff has not appeared in this court to support the judgment entered in her favor.

It is urged for reversal that plaintiff is barred by contributory negligence and that the evidence fails to establish a prima facie case of negligence by defendant.

The evidence for plaintiff tends to show that she was an insurance sales lady and that at the time in question, having observed the advertisement of defendant's place of business, "Jauma Beauty Salon," she entered the shop "through a door on Huron street, leading into a vestibule;" that Mrs. Blackmer, manager of the business, spoke to her, made inquiry as to her requirements and conducted her to a booth, telling her to be seated and wait until she might receive the attention she desired. Plaintiff says that the room was in semi-darkness and that while waiting she looked for a light and noticing a light fixture with a pull chain attached;

she thereupon attempted to turn ^{on} the light by pulling the chain; the light did not appear; she noticed a cord with a plug attached hanging from the fixture and leading to a socket below in the wall of the room; the socket was on a level with her hand and below the fixture; she took the plug and inserted it in the socket, and a spark from the socket burned her hand; the manager applied a salve or ointment to the hand and told her that the injury was not serious, and plaintiff says the manager also said that this had happened to others. Plaintiff by direction then went to another booth and one of the operators provided her with a finger wave. She paid for the services and left the premises. She afterward received medical attention from a Dr. Cousins for what he described as a second-degree burn, and she paid \$14 for the services.

The evidence for defendant is to the effect that plaintiff was not directed to the booth but went into it voluntarily and came out exclaiming, "Look what I have done!" Thereupon, one of the attendants applied ointment to the burn plaintiff received.

Mrs. Wedge, a customer at the time in question, testified that she was reading a magazine in the reception room, saw plaintiff go into the booth and run out, exclaiming, "Look what I have done!"

Defendant testified that she was proprietor of the shop at the time of the accident February 19, 1932; that she first knew of the accident on March 14th thereafter when she was handed a letter which the manager of the shop had received from the attorneys for plaintiff, making a claim for injuries. She testified she was not present at the time of the accident and knew nothing about the facts except what was told her by the manager; that the premises were at 679 North Michigan avenue, and that there was a main entrance on Michigan avenue and a side entrance on Huron street; that signs along the street advertised her business; that the entrance on Huron street had a screen door which was usually locked; that she did not know whether it was locked on the day of the accident;

that the Michigan avenue entrance was used solely for entrance purposes, and the door on Huron street for exit purposes; that the Michigan avenue entrance contained a large reception room where patrons were received awaiting their appointments, and the Huron street entrance contained a small vestibule with no chairs or places for patrons to be seated; that there were eight booths and each booth contained a dressing table, two chairs, and implements used in beauty treatment; that each booth was equipped with a light fixture attached to the wall; that the fixture had a pull chain socket and insulated cord leading to a socket; that during several months prior to the time of the alleged accident and before the notice was received from the attorneys for plaintiff, she did not know, nor was ever informed of any defect in any of the sockets or cords in the booths; that after the receipt of this letter she examined the sockets and cords in all the booths and found no defect.

Defendant contends, citing authorities, that plaintiff can not recover because she was guilty of contributory negligence and because the evidence does not make out a prima facie case of negligence. Cases, such as Ill. Central R. R. Co. v. Oswald, 338 Ill. 270, Deitz v. Belleville Co-Op. Grain Co., 273 Ill. App. 164, and Jones v. Kroger Grocery & Baking Co., 273 Ill. App. 183, are cited.

The general rules of law applicable to cases of this kind are well settled. The relationship of plaintiff to defendant at the time she received her injuries was that of a business visitor; that is, a person invited or permitted to enter or remain on premises in the possession of another for a purpose directly or indirectly connected with business dealings between them. See Restatement of the Law, sec. 332. Such possessor is subject to liability for injuries sustained by the visitors because of natural or artificial conditions on the premises, "if, but only if, (a) he knows, or by the exercise of reasonable care could discover, the condition which

that the field was given the same treatment as the other fields for the purpose of the test on which the first test was based; that the Michigan Avenue entrance contained a large number of people who were received in their automobiles, and the other street entrance contained a small vestibule and no other places for persons to be received; that there were signs on the wall of each booth containing a printed notice, two copies, and the notices used in both entrances; that each booth was equipped with a light fixture attached to the wall; that the fixtures had a glass cover and socket and insulated wire leading to a socket; that during several months prior to the time of the alleged accident, and before the notice was received from the telephone company, and the fact known, nor was ever informed of any defect in any of the sockets or cords in the booths; that after the receipt of this letter and the finding the sockets and wires in all the booths were found to be defective; Defendant contends, that Defendant, and Plaintiff are not recover because and the failure of Defendant's negligence and because the evidence does not show any negligence on the part of Plaintiff. Hence, cases, such as Ill. Central R. Co. v. Garfield, 228 Ill. 270, Garfield v. Bellville Co., 228 Ill. 270, 1909, 1909, and App. Johns v. First Street, 228 Ill. 270, 1909, 1909, are cited. The general rule of law applicable to cases of this kind are well settled. The relation is of liability to defendant at the time the remedy was given was that of a business visitor; that is, a visitor invited or permitted to enter or remain on premises in the connection of which for a business purpose or for other purposes connected with business dealings between them. The defendant of the law, see Ill. R.R. Co. v. Boardman, is subject of liability for injuries sustained by the visitor because of negligent or intentional conditions on the premises, "it, but only if, it, be known, or by the exercise of reasonable care could discover, the condition which

if known to him, he should realize as involving an unreasonable risk to them, (b) he has no reason to believe that they will discover the condition or realize the risk involved therein, (c) he invites or permits them to enter or remain upon the land without exercising reasonable care (i) to make the condition reasonably safe, or (ii) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are entitled to receive, if the possessor is a public utility." Restatement of the Law, sec. 343.

There is evidence by plaintiff to the effect that similar accidents had happened to others in connection with the switch. She says the manager so stated, and the manager was not called as a witness. This tends to show notice to defendant of some defect in the lighting equipment. The evidence is, however, too uncertain and indefinite to support a judgment. It will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

it known to him, he should realize as involving an intentional
risk to Chen, (b) he has no reason to believe that Chen will also
cover the condition of residence for Chen in respect to which
invites or permits Chen to return to Taiwan or the land without
excluding reasons (i) in the condition of residence
sale, or (ii) to give a written statement to Chen to avoid
the harm without prejudicing the right of the services which may be
entitled to receive, if the statement is a "public utility," the
statement of the law, now, 200.

There is evidence by Chen to the effect that Chen
accidents had occurred in connection with the service.
She says the accident was fatal, and the accident was not caused by
a witness. It is found to be a matter of fact in the case of
in the litigation. The evidence is, however, not sufficient
and it is to be expected a judgment. It will therefore be reversed
and the same reversed.

REVEREND AND HONORABLE

O'Connor, P. J., and Kennedy, J., dissent.

37409

MEYER F. BOSIN,
Defendant in Error,

v.

BERNARD F. WEBER,
Plaintiff in Error.

278 I.A. 6271

ERROR TO MUNICIPAL
COURT OF CHICAGO.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On January 23, 1933, plaintiff, an attorney at law, commenced a first class action against defendant to recover for legal services rendered in two special assessment proceedings, Nos. 51,607 and 51,750, wherein the assessments previously levied upon certain parcels of real estate owned by defendant in Chicago were materially reduced. It was alleged in the statement of claim that the services were rendered under an express verbal contract, made by plaintiff with defendant's authorized agent, whereby plaintiff was to receive as fees one-third (1/3) of the amounts of all reductions in said assessments; that reductions aggregating \$391 were obtained in one proceeding and \$4,467.97 in the other; and that one-third of these sums is \$1619.59, which is the total amount of plaintiff's claim, together with legal interest thereon from the respective times the reductions were adjudged because of defendant's unreasonable and vexatious delay in paying plaintiff for the services. Among the defenses set forth in defendant's affidavit of merits were that the claimed legal services were not rendered at defendant's request or with his consent; that defendant never agreed to pay such fees or any fees; and that the "supposed services were of no value to

278 I.A. 627

UNION TO MUNICIPAL
CITY OF CHICAGO

STATE OF ILLINOIS
COUNTY OF COOK
JANUARY 1, 1937
Plaintiff in Error

THE FOLLOWING IS A SUMMARY OF THE FACTS OF THE CASE:

On January 1, 1937, Plaintiff, an attorney at law, commenced a first class action against defendant to recover for legal services rendered in two special assessment proceedings, Nos. 31,407 and 31,750, wherein the assessments previously levied upon certain parcels of real estate owned by defendant in Chicago were materially reduced. It was alleged in the complaint of claim that the services were rendered under an express verbal contract, made by Plaintiff with defendant's authorized agent, whereby Plaintiff was to receive as fees one-third (1/3) of the amount of all reductions in said assessments; that reductions amounting to \$251 were obtained in one proceeding and \$4,667.97 in the other; and that one-third of these sums is \$151.32, which is the total amount of Plaintiff's claim, together with legal interest thereon from the respective times the reductions were adjudged because of defendant's unreasonable and vexatious delay in paying Plaintiff for the services. Now the defense set forth in defendant's affidavit of merits was that the claimed legal services were not rendered at defendant's request or with his consent; that defendant never agreed to pay such fees or any fees; and that the "supposed services" were of no value to

defendant." On November 21, 1933, there was a trial without a jury resulting in the court finding the issues against defendant, assessing plaintiff's damages at the sum of \$1,619.59, and entering a judgment against defendant in that sum, which by the present writ of error he seeks to reverse. Plaintiff has here assigned cross-errors to the effect that the court erred in not including in the judgment the sum of \$229.38, as interest, because of defendant's unreasonable and vexatious delay in making payment.

Prior to the trial the parties, by their attorneys, entered into a written stipulation as to certain facts. At the opening of the trial this stipulation was submitted to and considered by the trial judge, who ordered it filed with the clerk. It appears in the common law record but not in the bill of exceptions. On the trial the court also heard the testimony of plaintiff and three other witnesses called by him. Defendant testified at length in his own behalf and he called as a witness Bernice Chimberhoff, an employee of his during the year 1930. She testified as to seeing some time during that year two postal card notices (received by mail) of assessments on defendant's properties, but she was not allowed to testify, on objection made, as to a conversation she claimed to have overheard relative to the notices between defendant and his son-in-law, Dr. George E. O'Grady. Defendant's attorney stated that he offered to prove by the witness that defendant told O'Grady to take the two cards to plaintiff, with instructions to "file objections and notify him (defendant) before the case comes up." The salient facts as contained in said stipulation are as follows in substance:

Defendant is the owner of certain premises in Cook county which were assessed respectively for a public improvement. The original assessments, the amounts which they were reduced to and the saving in each case are as follows:

defendant." On November 13, 1933, there was a trial without a jury resulting in the court finding the issue against defendant, assessing plaintiff's damages at the sum of \$1,610.00, and entering a judgment against defendant in that sum, which by the present writ of error is sought to reverse. Plaintiff has here assigned errors to the effect that the court erred in not including in the judgment the sum of \$25.00 as interest, because of defendant's unreasonable and vexatious delay in making payment.

Prior to the trial the parties, by their attorneys, entered into a written stipulation as to certain facts. At the opening of the trial this stipulation was admitted to and confirmed by the trial judge, who ordered it filed with the clerk. It appears in the common law record but not in the bill of exceptions. On the trial the court also heard the testimony of plaintiff and three other witnesses called by him. Defendant testified at length in his own behalf and he called as a witness Francis O'Grady, an employee of his during the year 1930. He testified as to having some time during that year two postal card notices (received by mail) of assessments on defendant's properties, but that he was not allowed to testify, on objection under, as to a conversation she claimed to have overheard relative to the notices between defendant and his son-in-law, Mr. George A. O'Grady. Defendant's attorney stated that he offered to prove by the witness that defendant told O'Grady to take the two cards to plaintiff, with instructions to "file objections and notify him (defendant) before the case comes up." The relevant facts as contained in said stipulation are as follows in substance:

Defendant is the owner of certain premises in Cook County which were assessed respectively for a public improvement. The original assessments, the amounts which they were ordered to and the saving in each case are as follows:

| County Court
Docket No. | Original
Assessment | Assessments
Reduced to | Total
Savings |
|----------------------------|------------------------|---------------------------|------------------|
| 51607 | \$3,128.40 | \$2,737.40 | \$391 |
| 51750 | 19,760.40 | 15,292.43 | 4,467.97 |

The orders entered by the county court reducing the assessments were the result of trials in that court, wherein plaintiff and Daniel S. Wentworth appeared as defendant's attorneys.

The postal card notices of the assessments were delivered to plaintiff and retained by him until the present time.

On October 16, 1930, a notice, signed by said attorneys for defendant, of a motion to set aside a default and to amend certain schedules, was filed in the county court in cause No. 51750. The motion was allowed. The properties affected thereby were defendant's properties.

Defendant has paid the installments on said assessments, as reduced by court order as they fell due.

Statements or bills have been mailed to defendant by plaintiff on the basis of one-third (1/3) of the amount of the reductions, which defendant has refused to pay on the ground that he was not indebted to plaintiff.

Plaintiff's testimony on the trial was in part as follows:

Have known defendant for over 5 years. Became acquainted with him through his son-in-law, Dr. O'Grady. Have handled numerous litigations and other legal matters for defendant. In July, 1930, Dr. O'Grady came to my office with two special assessment notices (on postal cards) for "Albion avenue paving," (exhibits 1 and 2) and said to me: "Take care of these * *; they are on the old man's (defendant's) property; he wants you to take care of them." I said: "I do not do much in county court matters * * but I know attorney D. S. Wentworth * *. I will see Wentworth. * * If the assessment is reduced my charge will be one-third of the saving, and if there is no saving there will be no charge." O'Grady replied: "Go ahead." * * Thereafter I saw Wentworth and we, as defendant's attorneys, filed objections in the county court (Case No. 51,607) * *. During the fall of 1930, O'Grady brought to me 22 other postal cards or notices of special assessments (exhibits 3 to 24, inclusive) on other of defendant's properties, pertaining to the "Magnolia avenue sewer assessment," and said to me "Take care of these." I said: "I will do it the same way," and he replied: "Go ahead." * * Thereafter objections were filed for defendant in the Magnolia avenue assessment proceedings. (Case No. 51750*)

In the early part of 1931, after I had sent a bill for the work to defendant, he called me by telephone and said that he ought to have a public benefit improvement. I told him that there was no public benefit allowed on assessments such as these. * * Subsequently defendant again telephoned me and said that, as to the Albion assessment, he thought the North Park Board should pay for part of the paving. I said: "We will look into that." Later I advised him that

there could be no change.

I appeared several times in court with Wentworth. The Magnolia avenue case took about 8 weeks to try. Wentworth presented the facts and procured the necessary expert testimony. A large reduction was made in that case on defendant's properties. * * I had handled other special assessment cases for defendant prior to these two cases. I have not received any monies in payment of the services in these two cases.

I appeared in court several times with Wentworth in connection with the two cases. * * It is not a fact that Wentworth attended to all the details and that I simply approved of what he did. I was in his office when the petitions were prepared and I appeared with him in court. * * It is not a fact that I simply turned the matter over to Wentworth to handle for me. * * While engaged in the litigations defendant employed me in other legal matters and I was at his office at his request to discuss them.

Plaintiff's witness, Wentworth, an attorney of 33 years' practice and specializing in special assessment and tax cases, stated the details of his employment by plaintiff to assist in the prosecution of the litigation in defendant's behalf, the duration of the trials, the work done, etc., and expressed the opinion that "one third of the saving is a reasonable fee for the services rendered." In this opinion he was corroborated by the opinions of two other Chicago attorneys, called as plaintiff's witnesses. There was no evidence introduced by defendant to the contrary. Wentworth further testified: "My interest in this suit is that I expect Mr. Rosin (plaintiff) to pay me when he gets paid. * * I have no claim against Mr. Weber (defendant), but only a claim against Mr. Rosin."

Defendant's son-in-law, Dr. O'Grady, did not testify as a witness for either of the parties. During the trial it was further stipulated that as to case No. 51607, objections were filed in defendant's name by plaintiff and Wentworth as attorneys, and that the objections had reference to four parcels of land, owned by defendant and which are identical with exhibits 1 and 2 (Albion avenue paving assessment). Defendant testified in part as follows:

there could be no change.

I appeared several times in court, with my attorney, the
prosecution and defense. I was not a party to the trial.
I had no knowledge of the facts and circumstances of the case.
I had no knowledge of the evidence presented in the trial.
I had no knowledge of the arguments made by the attorneys.
I had no knowledge of the verdict rendered by the jury.

I appeared in court several times with my attorney in
connection with the two cases. I was not a party to the trial.
I had no knowledge of the facts and circumstances of the case.
I had no knowledge of the evidence presented in the trial.
I had no knowledge of the arguments made by the attorneys.
I had no knowledge of the verdict rendered by the jury.

My attorney, however, was not a party to the trial.
He was not a party to the trial.

He was not a party to the trial.
He was not a party to the trial.

"One third of the saving is a reasonable fee for the services
rendered."

In this opinion he was corroborated by the opinions
of two other disinterested attorneys, called as witnesses.

There was no evidence introduced by the defense
to the contrary.

My interest in this trial is that I
expected to see the result.

I expected to see the result of the trial.
I expected to see the result of the trial.

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I expected to see the result of the trial.
I expected to see the result of the trial.

follows:

I have had dealings with plaintiff, as an attorney-at-law, "through my son-in-law," Dr. O'Grady * * I gave Exhibits 1 and 2 to O'Grady, who suggested plaintiff as attorney "to attend to the matters." I told O'Grady "to take these notices to plaintiff and that all I wanted done was to have plaintiff file objections and inform me when the case was coming up for trial." * * "The reason I gave O'Grady those instructions was so I could talk the matter over before the case came up; I suppose O'Grady took the notices to plaintiff's office; he was supposed to take care of them." The next I heard about the matter was when I received a bill from plaintiff for 33-1/3 per cent of the allowances that had been made on the general reduction of the assessment. After receiving the bill I talked to plaintiff over the telephone, saying to him "my instructions to O'Grady were to do nothing except to file objections in the case and inform me when it was coming up." In reply plaintiff said: "I had forgotten about that; I slipped up on it." As to exhibits 3 to 24 (Magnolia Avenue sewer) "I never delivered these to Dr. O'Grady, or any one else, for the purpose of a contest; * * * I did not give any instructions to Dr. O'Grady to present these postal cards to Mr. Rosin." I never authorized Dr. O'Grady to arrange with Rosin for his compensation in any of these matters.

Plaintiff testified in rebuttal in part: I never had any conversation with Weber in which I said "I slipped up or forgot." I never had any conversation with him in which he said, as regards the two assessment proceedings in question, that I was to file objections for him but do nothing further.

The main contention of defendant's counsel, as a ground for the reversal of the judgment, is in substance that the proof of O'Grady's authority to employ plaintiff in the two special assessment proceedings and procure reductions on the assessments levied on defendant's properties, is not sufficient under the law. Considering all of the evidence we are unable to agree with the contention. While it is undoubtedly the law of this State that the authority of an agent "cannot be established by showing either what he said or did," that the source of authority is the principal, and that the agent's power "can only be proved by tracing it to that source in some word or act of the alleged principal" (Merchants' National Bank v. Nichols & Co., 223 Ill. 41, 49), we are of the opinion that the evidence in this case, including the circumstances in evidence, sufficiently disclosed O'Grady's authority to employ plaintiff on

defendant's behalf to render such legal services in the two special assessment proceedings as plaintiff with Wentworth's assistance did thereafter successfully render. It is also well settled law that, as between the principal and third persons, the principal is bound by all acts of the agent which are within the apparent scope of his authority. In 1 Mechem on Agency, 2nd Ed., Sec. 246, it is said:

"Gathering together all of these elements, it may be stated as a general rule that whenever a person has held out another as his agent authorized to act for him in a given capacity; or has knowingly and without dissent permitted such other to act as his agent in that capacity; or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent authorized to act in that capacity; - whether it be in a single transaction or in a series of transactions - his authority to such other to so act for him in that capacity will be conclusively presumed to have been given, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent authorized to do the act he assumed to do, provided that such act was within the real or apparent scope of the presumed authority."

See, also, Union Stock Yard Co. v. Mallory, etc. Co., 157 Ill. 554, 565; Wash v. Classen, 163 id. 409, 414; Faber-Musser Co. v. Dee Clay Co., 291 id. 240, 244. In the last cited case it is said: "The law is well settled that a principal is bound equally by the authority which he actually gives his agent and by that which by his own acts he appears to give." Furthermore, the evidence shows that plaintiff's and Wentworth's services were beneficial to defendant, that large reductions were made in the assessments that had been made on his properties, and that he has accepted the benefits which resulted from said reductions. (See Briggs v. Page, 222 Ill. App. 323, 327; Alton Mfg. Co. v. Garrett Biblical Institute, 243 Ill. 298, 311.)

And we are of the opinion that there is no substantial merit in defendant's counsel's further contention that because plaintiff delegated to Wentworth the performance of the major portion of the legal services rendered, without defendant's

knowledge or consent, plaintiff is not entitled to recover in the present action.

And we are further of the opinion that the court was justified under the evidence in not allowing interest on plaintiff's claim.

For the reasons indicated the judgment of the municipal court of November 21, 1933, is affirmed.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

knowledge of the fact that it is not possible to recover in the present manner.

and as the opinion of the opinion that the court was justified in not allowing recovery on the plaintiff's claim.

For the reasons stated the judgment of the municipal court of November 11, 1923, is affirmed.

Downing and Sullivan, JJ., concur.

37583

CHARLES N. SCHERER,
Appellant,

v.

GREENEBAUM SONS INVESTMENT
CO., a corporation,
Appellee.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

278 I.A. 627²

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, commenced March 7, 1934, there was a trial without a jury on May 16, 1934, resulting in the court finding the issues against plaintiff and entering a judgment for costs against him. By this appeal he seeks to reverse the judgment and to have this court enter a judgment in his favor and against defendant for \$1,000.

After the record had here been filed defendant moved to dismiss the appeal upon the ground in substance that plaintiff's "notice of appeal," as provided for in the new civil practice act, was defective. The motion was reserved to the hearing. It will now be denied.

In the statement of claim plaintiff alleges in substance that "prior to March 24, 1929," defendant, engaged in the business of selling bonds to the public, "collected for plaintiff the proceeds of certain bonds on the Rosemere Apartments and desired to reinvest the funds for him in another bond issue;" that plaintiff advised defendant that "if it would invest the funds in an early maturity of the St. George Hotel bond issue of the maturity of 1933 that it could invest such funds for him;" that thereafter he was informed by defendant that it had invested the funds in a \$1,000 bond of said St. George Hotel, and that the bond was in its

GRACE B. LAM, V. CHAMBERLAIN,
Appellant.

GRACE B. LAM, V. CHAMBERLAIN,
Appellee.

278 I.A. 627

COURT OF CIVIL CASES

COURT OF CIVIL CASES

IN REPLY TO THE ORDER OF THE COURT.

In a case action in connection, commenced March 7, 1934, there was a trial, without a jury on May 10, 1934, resulting in the court finding the license against plaintiff and entering a judgment for costs against him. By this appeal he seeks to reverse the judgment and to have this court enter a judgment in his favor and against defendant for \$1,000.

After the record has been filed defendant moves to dismiss the appeal upon the ground in substance that plaintiff's "notice of appeal," as provided for in the new civil practice act, was defective. The motion was reserved to the hearing. It will now be denied.

In the statement of claim plaintiff alleges in substance that "prior to March 24, 1933," defendant, engaged in the business of selling bonds to the public, "collected for plaintiff the proceeds of certain bonds on the defendant's premises and desired to reinvest the funds for him in another bond issue;" that plaintiff advised defendant that "if he would invest the funds in an early maturity of the St. George Hotel bond issue of the maturity of 1938 that it would invest such funds for him;" that thereafter he was informed by defendant that it had invested the funds in a 1930 bond of said St. George Hotel, and that the bond was in its

possession for safekeeping for plaintiff; that thereafter, "on July 22, 1930," plaintiff "discovered" that said funds "were not invested in a 1933 maturity but in a 1943 maturity," that he then and there "requested the return of his money, being the sum of \$1,000," but defendant refused and still refuses to make such return. To plaintiff's damage in the sum of \$1,000.

In defendant's affidavit of merits it stated as defenses to plaintiff's claim the following in substance: (1) That defendant did not inform plaintiff that it had invested his funds in a bond of the St. George Hotel of the maturity of 1933; (2) that before July 22, 1930, plaintiff had knowledge of the fact that his said funds had been invested by defendant for him in a bond of said Hotel of the maturity of 1943; and (3) that plaintiff has suffered no damage because the bond was of the maturity of 1943, instead of 1933.

On the trial plaintiff testified at considerable length and he called as a witness under section 33 of the municipal court act Edgar N. Greenebaum, vice president of defendant. He also introduced in evidence certain writings, including several letters passing between the parties. Defendant introduced in evidence certain other writings and also called as its witness said Greenebaum, who gave further testimony on direct and cross-examination. The following facts in substance are disclosed from the evidence.

For some time prior to March, 1929, plaintiff was a customer of defendant and from time to time had purchased from it for investment bonds or securities, which, by arrangement and for convenience and the better safekeeping, were left on deposit in defendant's possession, - receipts having been given to plaintiff for the securities so deposited. On March 13, 1929, defendant wrote plaintiff at his Chicago address to the effect that two \$500 bonds (which plaintiff owned) on the Rosemere Apartments would become due on May 1, 1929; that it was prepared to offer other choice securities in exchange; and that reinvestment could at once be made without loss of interest. Enclosed in the letter were circulars describing several recommended securities, among which was a circular concerning the bonds of the Hotel St. George. In reply plaintiff, under date of March 24, 1929, wrote to defendant at its Chicago office the following letter:

"My absence has prevented an earlier reply to your favor of March 13th. The proceeds from the Rosemere Apartments

possessors for recovering the principal; that thereafter, "on May 21, 1930," Plaintiff "discovered" that said bonds "were not invested in a 1928 maturity but in a 1933 maturity," that he then and there "requested the return of his money, being the sum of \$1,000," but defendant refused and still refuses to make such return. To Plaintiff's damage in the sum of \$1,000.

In defendant's affidavit of denial it stated as follows to Plaintiff's claim the following in substance: (1) That defendant did not inform Plaintiff that it had invested his funds in a bond of the St. George Hotel of the maturity of 1933; (2) that before July 22, 1930, Plaintiff had knowledge of the fact that his said funds had been invested by defendant for him in a bond of said Hotel of the maturity of 1933; and (3) that Plaintiff was suffered to damage because the bond was of the maturity of 1933, instead of 1928.

On the trial Plaintiff testified as a competent witness and he called as a witness under section 25 of the Municipal Court Act Edgar W. Greenbaum, Vice President of defendant. He also introduced in evidence certain writings, including several letters passing between the parties. Defendant introduced in evidence certain other writings and also called as its witness said Greenbaum, who gave further testimony on direct and cross-examination. The following facts in substance are elicited from the evidence:

For some time prior to March, 1928, Plaintiff was a customer of and from time to time had purchased from it for investment bonds or securities, which, by arrangement and for convenience and the better safeguarding, were left on deposit in defendant's possession, - receipts having been given to Plaintiff for the securities so deposited. On March 13, 1928, defendant wrote Plaintiff at his Chicago address to the effect that two \$500 bonds (which he said) on the corporate guarantee could be made without loss of interest, and that investment could be made in exchange; and that investment could be made on May 1, 1928; that it was proposed to offer other securities and that he recommended a security, among which was a security, concerning the bonds of the Hotel St. George. In reply Plaintiff, under date of March 24, 1928, wrote to defendant at Chicago to the following effect:

"I enclose and provided an earlier reply to your letter of March 13th. The proceeds from the corporate guarantee

bonds, due May 1/29, can well be invested in bonds of Hotel St. George, Brooklyn, N. Y., I think.

I prefer bonds due November 1/33 or May 1/33, early maturities."

Following the receipt of this letter defendant on March 26, 1929, purchased for plaintiff one \$1,000 Hotel St. George bond. This issue of bonds had been underwritten by defendant and others in November, 1928, but the permanent bonds were not actually issued and put upon the market until about May 1, 1929, and the only temporary certificates or receipts, in lieu of permanent bonds, which defendant then had for sale, were those maturing on May 1, 1943. On March 27, 1929, defendant mailed to plaintiff its usual form receipt for "one (1) temporary certificate for a Hotel St. George bond," stating the amount of the bond to be \$1,000, but the date of its maturity is not stated. It is further stated in the receipt that the certificate is "left with the Greenebaum Sons Investment Co., Chicago, for safekeeping," and that it is held "for your account and at your risk, to be delivered on the return of this receipt." After receiving the receipt and temporary certificate in March, 1929, plaintiff accepted several payments of interest on the certificate or bond from defendant. On May 10, 1930, at plaintiff's request, defendant sent him an "investment record book," stating the particulars of all bonds or securities of plaintiff that it was holding for him for safekeeping. In this book it appeared that the \$1,000 Hotel St. George bond matured in May, 1943. During July, 1930, about two months thereafter, plaintiff called at defendant's office, saw Mr. Greenebaum, had several conversations with him, and finally demanded of defendant that it pay to him the par value of the bond, but it refused to do so. Plaintiff thereafter accepted further interest payments made by defendant on the bond, but he testified that he only did so because of an understanding had with Mr. Greenebaum that such acceptance of interest "should not prejudice his case."

The testimony of Greenebaum, called as plaintiff's witness under section 33 of the municipal court act, is substantially in part as follows:

I had nothing to do with the matter "until about 1 year and 4 or 5 months after the sale of the bond to plaintiff" (i.e., about July, 1930.) He complained that he did not get a bond of the maturity that he wanted. Much correspondence and some further conferences followed. He finally said that "he wanted to get his money back and to cancel the entire transaction," and at the same time he stated that "he knew the price of the bonds had gone down." "I told him that he had only expressed a preference for a 1933 maturity, that we had sold him the only maturity we had, and that we were unwilling to give him his money back, because there had been a decline in the market value of the bonds; and I subsequently told him that we could give him a bond of the maturity he wanted, because they were both of approximately the same market value." He refused to accept this proposition. The bond we sold him is still in our possession for safekeeping. All the bonds were ^{him} then selling around 80." * * "The time I told him that we would give a bond of a different maturity was in 1930; the bond issue was not then in default; it went into default in May, 1933." He accepted some interest payments on the bond. Subsequently we mailed him some other checks for interest which at first he refused to accept, but subse-

quently did accept them. "I told him he was foolish not to take the interest as it was being paid; that we would be perfectly willing to let him take the interest and that it wouldn't prejudice his case any; and that if he felt he had a grievance he could have a hearing on the matter." Subsequently "he had many organizations look into the transaction - the Secretary of State, the Better Business Bureau, the Investors Protective Bureau," and others. The Secretary of State "stated that our offer to give him back a bond of the maturity which he originally preferred was a very fair offer and all we should be compelled to do."

Greenebaum's further testimony, as a witness for defendant, is in part as follows:

(Paper shown witness) "This is the memorandum which was used to record the purchase of the Hotel St. George bond, No. 4516, sold to plaintiff on March 26, 1929. It shows that the purchase price of this \$1,000 bond was \$975.80. It is a 5-3/4 per cent bond and sold to plaintiff to net 6 per cent. If this bond had been a 1933 instead of a 1943 maturity, the price of it would have been over \$990, instead of over \$975. * * We owned this bond that we sold to plaintiff. We underwrote 1/3rd of an \$800,000 issue. * * Our gross commission for underwriting it was approximately 3-1/2 per cent. We did not make a commission for placing the bond."

After considering the issues as made in the pleadings, the entire evidence as disclosed in the present record, and particularly plaintiff's letter to defendant of March 24, 1929, we are of the opinion that the trial court's finding and judgment were right and that the judgment should be affirmed. Arguing that the agreement between the parties is disclosed from defendant's letter of March 13, 1929, and plaintiff's letter in reply of March 24, 1929, plaintiff's counsel first contend that said agreement called for the investment of plaintiff's funds in a bond of the Hotel St. George of a 1933 maturity, and that when plaintiff discovered that said funds had been invested "contrary to his instructions," he had the legal right to rescind the agreement and recover back the amount of the funds. We cannot agree with the contention. It clearly appears that plaintiff directed defendant to purchase for him as an investment, out of the proceeds about to be realized from a prior investment, a Hotel St. George bond. He did not impose any conditions upon defendant beyond saying that he preferred the bond to be of the maturity of 1933 or an early maturity. Furthermore, the evidence

possibly this would mean, "I told him he was talking to me to come
 the interest as it was being paid; that he would be interested
 willing to let him have the interest and that it would be his to
 his name was; and that if he told him that a privilege he could have
 a home in the matter." These, namely, he had many suggestions
 look into the transaction - the subject of state, the better
 Business Bureau, the interest in the matter, and others, the
 Secretary of State "told" that our offer to give him back a bond
 of the matter which he originally suggested was a very late offer
 and all should be regarded as to."

Government's former testimony, as a witness for defense -

and, it is in part as follows:

(Latter known witness) This is the memorandum which
 was used to record the purchase of the Wall St. Georgia bond,
 Vol. 1812, sold to plaintiff on March 22, 1939. It shows that the
 purchase price of this bond was \$750.00. It is a 5-1/2%
 per cent bond and was to plaintiff to be paid. It was
 bond had been a 1939 bond instead of a 1937 bond. The price of it
 would have been over \$750, instead of over \$700. It was owned this
 bond that was sold to plaintiff. It was a bond of an \$800.00
 value. One Gross commission for underwriting it was approximately
 \$1-1/2 per cent. It did not make a commission in buying the bond."

After considering the issues as stated in the findings,

The entire witness as disclosed in the present report, and par-

ticularly Plaintiff's letter to defendant of March 12, 1939, we

are of the opinion that the trial court's finding and judgment are

right and that the judgment should be affirmed, finding that the

agreement between the parties is disclosed from defendant's letter

of March 12, 1939, and Plaintiff's letter in reply of March 22, 1939,

Plaintiff's counsel first contending that said agreement called for the

investment of Plaintiff's funds in a bond of the Wall St. Georgia

a 1937 maturity and that this Plaintiff discovered that said bond

had been invested "contrary to his intention," he had the legal

right to require the agreement to be rescinded and the amount of the

found. It cannot agree with the contention. It clearly appears

that Plaintiff directed defendant to purchase for him an invest-

ment, out of the proceeds about to be realized from a prior invest-

ment, a Wall St. Georgia bond. He did not impose any conditions

upon defendant beyond what he stipulated the bond to be of the

maturity of 1939 or an early maturity. Furthermore, the evidence

does not disclose that he, promptly or at any time, performed any acts essential to a rescission. There is no evidence that he ever made any formal tender to defendant of the temporary certificate or the bond or made any offer to return the interest he had from time to time received thereon. And there is no evidence in the record of any fraud in the transaction on the part of the defendant. And the evidence discloses that as early as during the year 1930, and nearly three years before any default had been made in the particular bond issue, defendant offered to exchange the bond which plaintiff then owned for one maturing in 1933, but that the offer was refused.

The record discloses that during the trial, and about at the conclusion of Greenebaum's testimony when under examination by plaintiff's attorney, the court made the statement: "I am afraid the Doctor (meaning plaintiff) is up against it, taking the interest." On account of this statement, plaintiff's counsel argue that the court's finding and judgment are against the evidence, because it appears from the testimony of both plaintiff and Greenebaum that in 1930 it was agreed between them that thereafter plaintiff's acceptance of accrued interest on the bond should not prejudice his case. The argument is without merit. It does not follow that the court entered the finding and judgment solely because plaintiff accepted such accrued interest. Even if this were so (which does not appear), it would not be a good ground for the reversal of the judgment, which is clearly sustained by the evidence and for other reasons.

The judgment of the municipal court of May 16, 1934, against plaintiff, should be affirmed and it is so ordered.

AFFIRMED.

Scanlan and Sullivan, JJ., concur.

does not disclose that he, promptly or at any time, contacted
any one connected to a transaction. There is no evidence that
he ever made any formal tender to defendant of the company
certificates or the bond or made any offer to return the interest
he had from time to time received thereon. And there is no evi-
dence in the record of any kind in the transaction on the part
of the defendant. And the evidence discloses that as early as
during the year 1930, and nearly three years before any attempt
had been made in the earlier bond issues, defendant offered to
exchange the bond which plaintiff then owned for one maturing in
1937, but that this offer was refused.

The record discloses that defendant, in 1930, and about
at the conclusion of defendant's testimony, when under examination
by plaintiff's attorney, the court made the statement: "I am
of the opinion that the Doctor (meaning plaintiff) is up to his eyes in
this." On account of this statement, plaintiff's counsel argues
that the court's finding and judgment are against the evidence, be-
cause it appears from the testimony of both plaintiff and Greenbaum
that in 1930 it was agreed between them that thereafter plaintiff's
responsibility as secured interest in the bond should not be for his
case. The agreement is without merit. It does not follow that the
court erred in its finding and judgment solely because plaintiff
accepted such account interest. Even if this were so (which does
not appear), it would not be a good ground for the reversal of the
judgment, which is already sustained by the evidence and for other
reasons.

The judgment of the municipal court of July 10, 1934,
against plaintiff, should be affirmed and it is so ordered.

36907

CHICAGO TITLE AND TRUST COMPANY
and FRANK BENJAMIN,
Plaintiffs in Error,

v.

MARGARET M. COLLINS and METROPOLITAN
TRUST CO., Receiver,
Defendants in Error.

ERROR TO SUPERIOR

COURT OF COOK COUNTY.

278 I.A. 627³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A bill to foreclose certain premises consisting of an apartment building, containing 31 apartments, located at 5109-5119 Kenmore avenue, Chicago, Illinois. Metropolitan Trust Company, formerly known as Cook County Trust Company, was appointed successor receiver of the premises. Frank Benjamin, who claims to be the lessee, in fact, of the premises, has sued out this writ to review two orders entered by the chancellor.

The master's report states the material facts in the case. It is as follows:

"DENIS E. SULLIVAN, JR., one of the Masters in Chancery of the Superior Court of Cook County, to whom the above entitled cause was, by an order of said Court heretofore entered, duly referred, with directions to take proofs and report the same, together with his conclusions on the matters involved in the pleadings in said cause, respectfully reports that, pursuant to said order and due notice given, he took the testimony submitted and received in evidence several papers and documents in writing marked as Exhibits herein and returned herewith.

"THE MASTER FURTHER CERTIFIES that each of the witnesses aforesaid, before testifying, was by him first duly sworn to testify the truth, the whole truth and nothing but the truth relating to said cause.

"STATEMENT OF THE CASE

"That on to-wit: the 29th day of July A. D. 1931

"That on account of the 25th day of July, 1931,

the METROPOLITAN TRUST COMPANY, a corporation, formerly known as COOK COUNTY TRUST COMPANY, was duly appointed successor receiver in the above entitled cause and is now the duly qualified and acting receiver of the premises involved therein, consisting of a certain brick apartment building containing thirty-one apartments, located at No. 5109-19 Kenmore Avenue in the City of Chicago, and State of Illinois.

"That prior to the appointment of the METROPOLITAN TRUST COMPANY, as successor receiver, the FORTHMAN-STATE TRUST AND SAVINGS BANK, a corporation, was the original receiver appointed by the Court to operate, manage and control the property involved in this cause, and as such receiver had entered into a certain lease with one FRANK BENJAMIN which said lease in substance provided that the said FRANK BENJAMIN should have the full operation, management and control of the said building and should pay therefor to the receiver the sum of twelve hundred dollars (\$1200.) per month; that this said lease was modified from time to time, by leave of Court first had and obtained, because of the inability of the said FRANK BENJAMIN to meet the payments due on account of said lease until on or about the 22nd day of February, A. D. 1932, at which time the said lessee, FRANK BENJAMIN, being in arrears in the payment of his rent which at that time had been reduced to the sum of one thousand dollars (\$1,000.00) per month, voluntarily surrendered possession of the said premises; the receiver herein consented to cancel the above lease or agreement he had with him in respect to the rental of the premises and on that date, to-wit: the 22nd day of February, A. D. 1932, the said FRANK BENJAMIN signed letters bearing the letterhead of the Cook County Trust Company, directed to the tenants in the building located at Number 5109-5119 Kenmore Avenue, advising them that he had surrendered to the Cook County Trust Company all of his right, title and interest in and to the lease of said premises, and the furniture, if any, in their possession, and further advised them that all unpaid rentals and rentals accruing on the respective apartments occupied by them in the said building should be paid directly to the Cook County Trust Company, 180 West Washington Street, Chicago, Illinois.

"That thereafter one DOUGLAS B. WOODWORTH offered to lease the premises from the said receiver for a period of thirteen months, beginning March 1, A. D. 1932, for the sum of nine hundred dollars (\$900.00) per month, which said lease was duly executed and entered into by and between the Cook County Trust Company, a corporation, as Receiver, and the said DOUGLAS B. WOODWORTH, pursuant to leave of Court first had and obtained, which said lease provided for the payment of four hundred fifty dollars (\$450.00) on the 15th day of March, A. D. 1932, four hundred fifty dollars (\$450.00) on the 31st day of March A. D. 1932, and four hundred fifty dollars (\$450.00) to be paid on the 15th day and the 1st day of each and every month until the expiration of said lease.

"That attached to and made a part of the lease which was received in evidence upon the hearing of this cause was a certain instrument signed by FRANK BENJAMIN, dated the 31st day of March, A. D. 1932, wherein and whereby the said FRANK BENJAMIN did sell, transfer, set-over, convey and deliver to CHICAGO TITLE AND TRUST COMPANY, a corporation, as trustee, for the holders of the bonds sought to be foreclosed in said proceedings, all of the right, title and interest of the said FRANK BENJAMIN in and to the furniture and equipment located on said property at Number 5109-5119 Kenmore Avenue, Chicago, Illinois, which said instrument

the "CONSTITUTIONAL TRUST COMPANY", a corporation, formerly known as
"THE TRUST COMPANY OF THE STATE OF ILLINOIS", was duly appointed receiver
in the above titled cause and is now the duly qualified and
acting receiver of the premises involved therein, consisting of a
certain brick apartment building containing thirty-one apartments
located at No. 1111-1113 Lawrence Avenue in the City of Chicago, and
City of Illinois.

"That prior to the appointment of the RECEIVING TRUST AND
TRUST COMPANY, as successor receiver, the RECEIVING TRUST AND
TRUST COMPANY, a corporation, was the original receiver appointed
by the Court to operate, manage and control the property involved
in this cause, and as such receiver had entered into a certain
lease with one EDWARD W. WALKER, which said lease in substance
provided that the said EDWARD W. WALKER should have the full
operation, management and control of the said building and should
pay therefor to the receiver the sum of five hundred dollars
(\$500.00) per month; that said lease was modified from time
to time, by leave of Court first had and obtained; because of the
inability of the said EDWARD W. WALKER to meet the payments due on
account of said lease until on or about the third day of February,
1933, at which time the said EDWARD W. WALKER, being
in arrears in the payment of his rent which at that time had been
reduced to the sum of one thousand dollars (\$1,000.00) per month,
voluntarily surrendered possession of the said premises; that
two days thereafter consented to cancel the above lease or agreement
he had with him in respect to the rental of the premises and on
that date, to-wit: the third day of February, 1933, the said
EDWARD W. WALKER signed letters bearing the signature of the book
company, first receiver, directed to the tenants in the building
to the effect that the said EDWARD W. WALKER was advising them that
he had transferred to the book company all of his
right, title and interest in and to the lease of said premises,
and the furniture, fixtures and contents thereof, and further advised
them that all unpaid rents and arrears owing to the receiver
should be paid by them to the book company, and that thereafter
directly to the book company, first receiver, 1111-1113 Lawrence
Avenue, Chicago, Illinois.

"That thereafter on or about the third day of February
the receiver from the said receiver for a period of fifteen
months, to-wit: from the first day of February, 1933, to the first day of
March, 1934, for the sum of nine hundred
dollars (\$900.00) per month, which said lease was duly executed
and entered into and between the book company, first receiver, a
corporation, as receiver, and the said EDWARD W. WALKER, who
was and obtained, which said
lease provided for the payment of four hundred fifty dollars
(\$450.00) on the first day of each month, to-wit: the first day of
February, 1933, on the first day of March, 1933, and four
hundred fifty dollars (\$450.00) to be paid on the first day and the
last day of each and every month until the expiration of said lease.

"That according to and made a part of the lease which
the receiver in reliance upon the making of this lease was a
certain instrument filed by the RECEIVING TRUST AND TRUST
COMPANY, first receiver, and in reply the said EDWARD W. WALKER, who
did sell, transfer, convey and deliver to the book company, first
receiver, a corporation, as receiver, for the holders of
the bonds sought to be foreclosed in said proceedings, all of the
furniture and equipment located on said property at number 1111-
1113 Lawrence Avenue, Chicago, Illinois, which is an instrument

recited upon its face that it was given by FRANK BENJAMIN for and in consideration of the cancellation of his rent obligation to the Cook County Trust Company, as receiver, which arrears had accumulated up to February 9, 1932, and amounted to approximately the sum of three thousand three hundred thirty dollars and forty cents (\$3,330.40).

"That subsequent to the execution of the lease between the Cook County Trust Company, as receiver, and DOUGLAS B. WOODWORTH, the said DOUGLAS B. WOODWORTH employed the said FRANK BENJAMIN as his agent or manager of the premises, and as such agent or manager the said FRANK BENJAMIN entered into possession of the said premises and collected the rents until on or about the 15th day of July, A. D. 1932, at which time the said DOUGLAS B. WOODWORTH defaulted under the terms of the said lease and the same was cancelled by the Cook County Trust Company, as receiver.

"That thereafter, on to-wit: the 22nd day of July, A. D. 1932 a certain order was entered by his Honor, Judge Marcus Kavanagh, upon an oral motion made by FRANK BENJAMIN by his solicitor, Hugh O'Neill; which said order was in words and figures, as follows:

"STATE OF ILLINOIS }
COUNTY OF COOK } SS

"IN THE SUPERIOR COURT OF COOK COUNTY

"CHICAGO TITLE AND TRUST COMPANY,
as, etc. }

-vs-

GEN. NO. 533073

MARGARET N. COLLINS }

"ORDER

"It is hereby ordered that Metropolitan Trust Company, Receiver for 5109-19 Kenmore Avenue, Chicago, accept from Frank Benjamin the rental of the premises as provided in the Lease dated First day of March, 1932, between Cook County Trust Company as Receiver and Douglas B. Woodworth and that Frank Benjamin have leave to operate the building and collect the rents as he has heretofore done.

"MARCUS KAVANAGH
JUDGE

"July 22, 1932"

"That at the time of the entry of the order hereinabove referred to the said FRANK BENJAMIN presented a certain affidavit wherein he in substance averred that the said Douglas B. Woodworth, the lessee in the lease dated March 1, 1932, had no interest in the premises, other than that the lease was made in his name, for the use and benefit of the said FRANK BENJAMIN; that the said DOUGLAS B. WOODWORTH was merely a nominal lessee and that the said FRANK BENJAMIN was in fact the principal; that as such principal he had been in the active management and operation of the premises, and had, since the 1st day of April, A. D. 1932, decorated twenty-four apartments, at a cost of more than eight hundred dollars (\$800.); that further, the four hundred and fifty dollars (\$450.00), which said sum had been deposited by the said DOUGLAS B. WOODWORTH with

received upon its face that it was given to him for the
in consideration of the collection of his last collection as the
Cook County Trust Company, as receiver, and was not a receipt
up to January 1, 1933, and amounted to approximately the sum of three
thousand three hundred thirty dollars and forty cents (\$3,340.40).

"That subsequent to the execution of the lease between the
Cook County Trust Company, as receiver, and the Cook County Trust
Company, the said Cook County Trust Company employed the said FRANK
as agent or attorney of the premises, and as such agent or attorney
the said FRANK entered into possession of the said premises
and collected the rent thereon on or about the 15th day of July,
A. D. 1933, at which time the said FRANK was accompanied by the
manager of the said premises and the same was controlled by the
Cook County Trust Company, as receiver.

"That thereafter, on or about the 22nd day of July,
1933 a certain order was entered by the court, Judge Moore presiding,
upon motion made by FRANK, whereby the said FRANK was appointed
receiver of the said premises, and the same was controlled by the

"STATE OF ILLINOIS
COUNTY OF COOK

IN THE COURT OF SHERIFF OF COOK COUNTY

"RETURNED BY THE SHERIFF OF COOK COUNTY
ON JULY 22, 1933

RECEIVED JULY 22, 1933

RECEIVED JULY 22, 1933

"It is hereby ordered that Metropolitan Trust Company, Receiver
for EICO-10 Tenney, Vernon, Chicago, Illinois, accept from FRANK, Agent
the rental of the premises as provided in the lease dated the 1st
day of March, 1933, between Cook County Trust Company, as receiver,
and FRANK, as agent or attorney of the premises, and FRANK shall have to
operate the building and collect the rents as he has heretofore
done.

RECEIVED JULY 22, 1933

JULY 22, 1933

"That at the time of the entry of the order heretofore
mentioned to the said FRANK, FRANK presented certain evidence
wherein he in substance averred that the said FRANK, as receiver,
the lease in the lease dated March 1, 1933, had no interest in the
premises, other than that the lease was made in his name, for the
use and benefit of the said FRANK, and that the said FRANK
was the owner of a certain lease, and that the said FRANK
was the owner of the premises; that he such principles he had
been in the active management and operation of the premises, and
had, since the day of April, 1933, been in possession of the
premises, and a copy of the lease dated March 1, 1933, which
said FRANK, as receiver, had deposited by the said FRANK with

the Receiver at the time of the execution of the lease, to be held as security for the faithful performance of the covenants of the lease and of the rider attached thereto, was in fact, the money of the said affiant FRANK BENJAMIN.

"Immediately upon the entry of the order hereinbefore set forth the said FRANK BENJAMIN entered into possession of the premises and proceeded to collect the rents until on or about the 30th day of August, A. D. 1932.

"That on the date last aforesaid, to-wit: the 30th day of August, A. D. 1932, the Receiver, by its solicitors, Barthell and Rundell, due notice having been served upon all of the parties in interest, appeared before his Honor, Judge Joseph B. David, who had succeeded his Honor, Judge Marcus Kavanagh in the hearing of emergency matters in respect to odd numbered Superior Court cases, and moved for the entry of an order in accordance with the prayer of a written Petition filed in support of said motion, which said order was duly entered and was in words and figures as follows:

"STATE OF ILLINOIS }
COUNTY OF COOK } SS

"IN THE SUPERIOR COURT OF COOK COUNTY

"CHICAGO TITLE AND TRUST COMPANY,
as, etc. }

vs. }

GENERAL NUMBER 333073

MARGARET H. COLLINS }

"ORDER

"This matter coming on to be heard upon the petition of Metropolitan Trust Company, receiver, this day filed herein, and upon notice to all parties in interest through their solicitors, and the court having examined said petition, finds that it has jurisdiction of the parties hereto and the subject matter hereof; that on July 22, 1932, by virtue of an order entered in this cause, Frank Benjamin assumed to make certain payments to the receiver, and was given leave to operate the premises described in the Bill of Complaint; the Court further finds that the said Frank Benjamin has made default in said payments and is now indebted to said receiver in the sum of \$966.00.

"It is therefore ORDERED, ADJUDGED AND DECREED

- "(1) That the right of the said Frank Benjamin in and to the possession of said premises is hereby declared forfeited;
- "(2) That said Frank Benjamin vacate said premises and all parts thereof within two days from the date hereof;
- "(3) That said Frank Benjamin account to the receiver herein for all moneys collected by him and which he has failed to turn over to said Receiver;
- "(4) That Metropolitan Trust Company, receiver herein, do have and recover from the said Frank Benjamin the sum of \$966.00, and have execution therefor.

The receipt of the sum of \$100.00 from the estate of the deceased, as shown by the receipt of the executor of the estate, is hereby acknowledged.

Witness my hand and seal of office, this 10th day of March, 1934.

Notary Public for the State of New York.

STATE OF NEW YORK
COUNTY OF NEW YORK

IN SENATE
JANUARY 10, 1934

REPORT OF THE COMMISSIONER OF THE LAND OFFICE

RECEIVED

RECEIVED

1934

This report contains a list of the lands owned by the State of New York, and a description of the same. It also contains a list of the lands owned by the State of New York, and a description of the same.

REPORT OF THE COMMISSIONER OF THE LAND OFFICE

(1) That the title of the said Frank Benjamin is and to the possession of said premises is hereby acknowledged.

(2) That the said Frank Benjamin is and to the possession of said premises is hereby acknowledged.

(3) That the said Frank Benjamin is and to the possession of said premises is hereby acknowledged.

(4) That the said Frank Benjamin is and to the possession of said premises is hereby acknowledged.

"(5) That said Frank Benjamin, his agents, servants and employees be and each of them hereby is restrained and enjoined from collecting any further rentals from subtenants in said premises, or from in any other way assuming control, management or operation of said premises, or any part thereof, or from interfering with the right of possession of Metropolitan Trust Company, receiver, from interfering or annoying any of the sub-tenants in the premises known as 5109-19 Kenmore Avenue, Chicago, Illinois;

"(6) That Frank Benjamin be and he is hereby directed to surrender possession of said premises to Metropolitan Trust Company, receiver, and to turn over and deliver to the said receiver all keys and other property in his possession which belong to or are a part of said premises.

"ENTER

" JOSEPH B. DAVID
JUDGE

"August 30, 1932"

"That on the following day, to-wit: the 31st day of August, A. D. 1932, the said FRANK BENJAMIN, by his attorney Hugh O'Neill, appeared before his Honor, Judge Joseph B. David and moved that the order of August 30, 1932 be vacated and set aside, alleging as ground therefor the following:

"(1) That at the time of the entry of the order dated August 30, 1932 there were two motions on Judge David's motion book in connection with this cause; that one appeared upon page 1 of the motion book and that the other appeared upon page 3; that because of the confusion in the fact that both motions which involved the same cause, but which were of an entirely different nature, appeared upon the motion book of that day, this particular order was entered by his Honor, Judge David, without the said FRANK BENJAMIN being given an opportunity to be heard, altho it is conceded by Mr. Benjamin, and the Master so finds, that the entry of the said order was not secured thru any misrepresentation on the part of the firm of Barthell & Fundall, representing the Receiver, or thru any desire or endeavor on their part to obtain its entry surreptitiously, or in the absence of Mr. Benjamin.

"(2) That the order of August 30, 1932 should not, as a matter of fact or of law, been entered by the Court, but that had FRANK BENJAMIN been present and been able to be heard, such an order would never, upon the facts of the case, have been justified.

"FROM THE PLEADINGS AND EVIDENCE SUBMITTED THE MASTER FINDS AS FOLLOWS:

"FIRST: That this Court has jurisdiction of the parties to this cause and of the subject matter hereof.

"SECOND: That upon the hearings had in this cause certain evidence was offered on behalf of FRANK BENJAMIN tending to show the confusion in respect to the fact that two separate and distinct motions of an entirely different nature, in connection with the

(1) That Frank Benjamin, his mother, sister and employed by and each of them living in further remarks from possession in said premises, from in any other way securing custody, manner, most or operation of said premises, or any part thereof, or from transferring same in right of possession of Benjamin from Benjamin, receiver, from information or receiving any of the same, in the premises known as 2108-10 Lawrence Avenue, Chicago, Illinois;

(2) That Frank Benjamin be and he is hereby directed to surrender possession of said premises to Benjamin, receiver, and to turn over and deliver to the said receiver all keys and other property in his possession which belong to or are a part of said premises.

"ORDER"

"IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the Court at Chicago, Illinois, this 30th day of August, 1932."

"August 30, 1932"

"That on the following day, to-wit: the 31st day of August, 1932, the said FRANK BENJAMIN, by his attorney, O'Neil, appeared before the Court, Judge Joseph A. Davis and moved that the order of August 30, 1932 be vacated and set aside, alleging as ground therefor the following:

"(1) That at the time of the entry of the order before August 30, 1932 there were two motions on Judge Davis's motion book in connection with this cause; that one appeared upon page 1 of the motion book and that the other appeared upon page 2; that because of the confusion in the fact that both motions which involved the same cause, but which were of an entirely different nature, appeared upon the motion book of the day, this judicial order was entered by Judge Davis, without the aid of FRANK BENJAMIN being given an opportunity to be heard, since it is conceded by Judge Davis, and the Court so finds, that the entry of the said order was not necessary from any misapprehension on the part of the Court or the Court's clerk, representing the receiver, or from any desire or endeavor on said part to obtain the early satisfaction, or in the absence of Mr. Benjamin.

"(2) That the order of August 30, 1932 should not, as a matter of fact or of law, have entered by the Court, and that said FRANK BENJAMIN has been present and been able to be heard, and an order would never, upon the facts of the case, have been justified.

"THAT THE HONORABLE JUDGE JOSEPH A. DAVIS, JUDGE OF THE COURT IN CHARGE OF THE COURT."

"That this Court has jurisdiction of the parties to this cause and of the subject matter hereof.

"That upon the hearing had in this cause certain evidence was offered on behalf of FRANK BENJAMIN tending to show the confusion in the fact that two separate and distinct motions of an entirely different nature, in connection with the

same cause, were on Judge David's motion book on the morning of August 30, 1932; that without going into any further detail as to how it occurred that FRANK BENJAMIN did not have an opportunity of being heard, it was conceded by the Receiver at the hearings had in this cause, and the Master found, by virtue of the fact that the merits of the case were gone into, and does likewise now find, that it would be only fair and equitable that Mr. Benjamin have the right to appear and present whatever arguments he desired in respect to the entry of the order of August 30, 1932; THE MASTER FURTHER FINDS that many hours were spent upon the hearing of this cause, during which time a full opportunity was given both parties to present whatever evidence or arguments they desired in furtherance of their respective contentions.

"THIRD: THE MASTER FURTHER FINDS that whatever rights FRANK BENJAMIN had under his original lease with the Receiver in this cause were voluntarily terminated by him on February 22, 1932, at which time he surrendered to the Cook County Trust Company all of his right, title and interest in and to the lease of the said premises, and the furniture therein, and advised the tenants that all unpaid rentals on any apartment occupied by them in that building were to be paid directly to the Cook County Trust Company.

"FOURTH: That the lease of March 1, A. D. 1932 was signed by one DOUGLAS B. WOODWORTH, as principal, and failed to recite upon its face, nor was any indication given, that it was anything but the lease of the said DOUGLAS B. WOODWORTH and not that of FRANK BENJAMIN.

"FIFTH: That the action of the said FRANK BENJAMIN who testified upon the hearings of this cause that he paid DOUGLAS B. WOODWORTH the sum of sixty dollars (\$60.00) to execute said lease as a 'dummy' and the subsequent action of the lessee, DOUGLAS B. WOODWORTH, in naming FRANK BENJAMIN as his agent to manage, operate and control the premises, and to collect the rents, issues and profits thereof, would appear upon its face to be a transaction, the effect of which would be to cause the receiver of the premises involved in these proceedings to enter into a lease with a tenant, who had from past experiences, been unacceptable to it; that the said FRANK BENJAMIN did not contend, upon the hearing of this cause, that the order entered by his Honor Judge Marcus Kavanagh, on the 22nd day of July, A. D. 1932, recognized him as the principal in that certain lease wherein he claimed that DOUGLAS B. WOODWORTH was but a nominal lessee, but rather took the position that the lease had in fact been cancelled, and that that portion of Judge Kavanagh's order which provided that the Receiver should 'accept the rental of the premises as provided in the lease dated the 1st day of March, A. D. 1932,' was but a measure of the amount of money that should be paid per month by FRANK BENJAMIN for the use of the premises from and after the 22nd day of July, A. D. 1932; that the said FRANK BENJAMIN then argued that the order of Judge Kavanagh was binding upon said Receiver and could not at any future time be superseded or changed in any way thru any order entered by himself or by any other Judge of the Superior Court, to whom the said cause might regularly be assigned.

"SIXTH: THE MASTER FURTHER FINDS that the hearings had in this cause were lengthy and that a great amount of evidence was adduced by both parties; that the testimony was taken by a Court Reporter, but that at the conclusion of the hearings of the cause, it was agreed by and between the parties that the Master should render his Report upon the oral testimony heard and considered and that the record should not be transcribed except in the event of

[illegible]

Building was to be given in full to the L. J. Jones Company. All unpaid rentals on my apartment occupied by them in that premises, and the furniture therein, and valued the tenants in all of his right, little and interest in and to the lease of the said 1932, at which time he returned to the Cook County Trust Company. This case was voluntarily settled, by him on January 22, 1932. I have had under the original lease with the receiver in 1932. The L. J. Jones Company had no right to the building.

1. The fact that the above information was obtained from a confidential source who has provided reliable information in the past, and that the source has provided information in the past which has been used by the FBI in the past, is a factor in the determination of the reliability of the information.

That the action of the said FARM BROS. CO. who testified upon the hearings of this cause that he paid OGDEN B. C. the sum of sixty dollars (\$60.00) to execute said lease as a 'dummy', and the subsequent action of the lease, OGDEN B. C. in coming to FARM BROS. with an intent to execute, operate and control the premises, and to collect the taxes, taxes and profits thereon, would appear upon the face to be a transaction, the effect of which would be to make the receiver of the premises involved in these proceedings to execute the lease with a tenant, who had them past experience, been unapproachable to it; that the said FARM BROS. did not contend, upon the hearing of this cause, that the order entered by his honor Judge Lewis, on the 22nd day of July, 1933, whereby he claimed that OGDEN B. C. was the principal in that certain lease, within the position that the lease had in fact been one made, and that the portion of Judge Kavanagh's order which provided that the receiver should the day of March, 1934, pay but a minimum of the amount of money that should be paid per month by FARM BROS. for the use of the premises from and after the 2nd day of July, A. D. 1933; that the said FARM BROS. did then request the order of Judge Kavanagh and disclaim upon said receiver and could not at any future time be superadded or changed in any way that any order entered by himself or by any other Judge of the Superior Court, to whom the cause might regularly be assigned.

that the record would not be described except in the event of a retrial. His report upon the oral testimony heard and considered and the record was approved by the court. The court also stated that the testimony was taken by a Court reporter, but that the transcription of the testimony of the witness was made by the court. The court also stated that the testimony was taken by a Court reporter, but that the transcription of the testimony of the witness was made by the court.

objections being filed to the Master's Report herein, and that then, in that event, any one party might cause that particular part of the record to be written up which would be necessary for the Court to have before it in the consideration of the arguments on any exceptions, copy of which Stipulation herein referred to is made a part hereof, attached hereto and marked Exhibit 'A'.

"SEVENTH: THE MASTER FURTHER FINDS from a consideration of all of the evidence on both sides that the proceedings in this cause were brought by the CHICAGO TITLE AND TRUST COMPANY, a corporation, as successor trustee, to foreclose the lien of a certain Trust Deed given to secure the payment of numerous bonds, in the aggregate principal amount of one hundred fifty thousand dollars (\$150,000.00); that the suit was brought by the said Trustee in a representative capacity on behalf of the owners and holders of all of the bonds secured by that Trust Deed; that the receiver was appointed by this Court upon the motion of the complainant Trustee, because the Court must have felt that it should intervene and place its representative upon the premises or in control thereof, for the purpose of conserving the assets and operating and managing the premises, with the thought in mind that ultimately the owners of the bonds secured by the said Trust Deed might salvage something from their investment. That the said Receiver so appointed by the Court should not be impeded in its work by continually having to struggle with an unacceptable tenant for the right to operate the premises as it sees fit.

"EIGHTH: THE MASTER FURTHER FINDS from the evidence in this cause that FRANK BENJAMIN terminated his contractual relationship with this Receiver on or about the 22nd day of February, A. D. 1932; that he acquired no rights by virtue of the lease dated the 1st day of March, A. D. 1932, between DOUGLAS B. WOODWORTH and the COOK COUNTY TRUST COMPANY, as Receiver; that he had not signed the lease, that he was not subject to any of the liabilities thereunder and should not be entitled to receive any of the benefits therefrom; that the order entered by his Honor, Judge Marcus Kavanagh on the 22nd day of July, A. D. 1932, was six lines in length; that it did not recognize FRANK BENJAMIN as lessee, of these premises in lieu and in stead of DOUGLAS B. WOODWORTH; that it merely ordered the Receiver to accept from FRANK BENJAMIN the rentals of the premises as provided in DOUGLAS B. WOODWORTH'S lease, and that FRANK BENJAMIN had leave to operate the building and collect the rents as he had theretofore done; that the said order did not provide for how long a period of time the said Receiver should continue to accept the rentals as therein provided, nor for how long a period the said FRANK BENJAMIN should have leave to operate the building and collect the rents thereof.

"NINTH: THE MASTER FURTHER FINDS that at the time the order was entered before Judge David on to-wit: the 30th day of August, A. D. 1932, the cause was regularly assigned to his Honor, Judge David, as one of the Judges of the Superior Court of Cook County, and that he had full power and authority to enter the order that he did enter in the same manner that Judge Marcus Kavanagh would have been empowered to vacate and set aside his order of July, 22, A. D. 1932, or to enter any other order which might be in direct contradiction thereof.

"TENTH: THE MASTER THEREFORE RECOMMENDS that the motion of FRANK BENJAMIN under date of August 30, 1932 to vacate the order entered by Judge David on August 30, 1932, be denied with the exception of that particular portion of the order which reads, in words and figures, as follows:

"(4) That Metropolitan Trust Company, Receiver herein, do have and recover from the said Frank Benjamin the sum of \$966.00 and have execution therefor',

AND THE MASTER RECOMMENDS THAT likewise, that portion of the order which finds that the said FRANK BENJAMIN is indebted to the Receiver in the sum of nine hundred sixty-six dollars (\$966.00) be modified as hereinafter set forth; that the Master makes this recommendation in respect to the modification of that particular portion of the Order by virtue of the following facts which were brought forth upon the hearings had in this cause:

"1. That at the time of the execution of the lease between the Receiver and DOUGLAS B. WOODWORTH on March 1, 1932, the said DOUGLAS B. WOODWORTH deposited the sum of four hundred fifty dollars (\$450.00) to be held as security for the faithful performance of the covenants of the said lease.

"2. That the said FRANK BENJAMIN has testified upon the hearing of this cause that the sum of four hundred fifty dollars (\$450.00) had been furnished by him, inasmuch as WOODWORTH was his nominal lessee.

"3. That the sum of \$966.00 found in said order to be due to FRANK BENJAMIN from the Receiver, is comprised of the following items: first, the sum of \$66.00 representing the balance due for the month of July, which said sum the Master does now find the said FRANK BENJAMIN to be in arrears; second, the sum of four hundred fifty dollars (\$450.00) representing payment due on account of the rental of the said premises for the period commencing August 1, 1932, and ending August 15, 1932, and third, the further sum of four hundred fifty dollars (\$450.00), representing the rental from August 15th, 1932 to August 31st, 1932.

"ELEVENTH: That inasmuch as the order was entered on August 30, 1932, the sum of four hundred fifty dollars (\$450.00), representing the rental to be paid for the last half of the month of August was not due and should not properly have been included in said order.

"TWELFTH: That it would appear to be only fair and equitable that the said FRANK BENJAMIN be credited with the sum of four hundred and fifty dollars (\$450.00) deposited as security for the performance of the covenants of said lease and that said money be applied by the said Receiver in satisfaction of the rental due to the Receiver for the period from August 1, 1932 to August 15, 1932.

"THIRTEENTH: THE MASTER THEREFORE RECOMMENDS: (a) that that portion of the order which finds a money decree in favor of the Receiver and against the said FRANK BENJAMIN in the sum of nine hundred sixty-six dollars (\$966.00), be modified to provide for a decree in favor of the said Receiver in the sum of sixty-six dollars (\$66.00) only. (b) That the motion to vacate the order entered by Judge Joseph B. David on August 30, 1932 be denied, and that the order be continued in full force and effect with the modification hereinbefore suggested."

The exceptions of Benjamin to the master's report were overruled and the following decretal order, dated November 7, 1932, was entered:

that the Receiver has not received from the Trust Company, Receiver herein, the sum of \$500.00 and have execution thereon.

And the Receiver has not received from the Trust Company, Receiver herein, the sum of \$500.00 and have execution thereon.

1. That at the time of the execution of the lease between the Receiver and the Trust Company, Receiver herein, the sum of \$500.00 was deposited in the sum of \$500.00 and have execution thereon.

2. That the said TRUST COMPANY has satisfied upon the hearing of this cause that the sum of four hundred fifty dollars (\$450.00) has been furnished by him, inasmuch as \$500.00 of his nominal lease.

3. That the sum of \$500.00 found in said order to be due to the Receiver from the Trust Company, Receiver herein, is comprised of the following items: first, the sum of \$50.00 representing the balance due for the month of July, which said sum the Receiver does not find the said TRUST COMPANY to be in arrears; second, the sum of four hundred fifty dollars (\$450.00) representing payment due on account of the rental of the said premises for the period commencing August 1, 1932, and ending August 1, 1933, and which, the Receiver has not received from the said TRUST COMPANY, Receiver herein, the sum of four hundred fifty dollars (\$450.00), representing the rental from August 1st, 1932, to August 1st, 1933.

4. That inasmuch as the order was entered on August 30, 1933, the sum of four hundred fifty dollars (\$450.00) representing the rental to be paid for the last half of the month of August was not due and should not properly have been included in said order.

5. That it would appear to be only fair and equitable that the said TRUST COMPANY be credited with the sum of four hundred and fifty dollars (\$450.00) a positive security for the performance of the covenants of said lease and the said money be applied by the said Receiver in satisfaction of the rental due to the Receiver for the period from August 1, 1932 to August 1, 1933.

6. That the Receiver has not received from the Trust Company, Receiver herein, the sum of \$500.00 and have execution thereon.

The exceptions of Benjamin to the master's report were overruled and the following decretal order, dated November 7, 1933, was entered:

"This matter coming on to be heard this day by the court in accordance with the order heretofore entered setting this cause for hearing, and it appearing to the court that certain objections filed on behalf of Frank Benjamin to the report of Dennis E. Sullivan, Jr. Master in Chancery heretofore filed herein were ordered to stand as objections to said report, and it further appearing to the Court that on August 30, 1932, a certain order was entered herein by the Honorable Joseph B. David, Judge of this Court, and on to-wit, the first day of September, 1932, the said Frank Benjamin, by his solicitor, moved the Court to vacate the order of the said Judge David entered on August 30, 1932, and upon hearing the said motion the same was, on motion of solicitor for Frank Benjamin, referred to the Honorable Denis E. Sullivan Jr. Master in Chancery of this Court, to take proofs and report his conclusions of law and fact thereon to this Court; and now this matter coming on to be heard on the exceptions to said Master's Report filed on behalf of said Frank Benjamin, and the Court having considered said Report and having heard the arguments of counsel thereon, finds that the said Report of the said Denis E. Sullivan Jr. Master in Chancery, should be in all respects confirmed.

"It is therefore, Ordered, Adjudged and Decreed:

- (1) That the Report of Master in Chancery, Denis E. Sullivan Jr., heretofore filed herein on Oct. 30th, 1932, be and the same is in all respects confirmed, and the exceptions heretofore filed to said Report on behalf of said Frank Benjamin, be and they are hereby overruled.
- (2) That the order heretofore entered herein by the Honorable Joseph B. David, on Aug. 30, 1932, be modified so as to strike out the portion thereof reading as follows: '(4) That Metropolitan Trust Co. Receiver herein, do have and recover from the said Frank Benjamin the sum of \$966.00 and have execution therefor.'
- (3) That Metropolitan Trust Co. Receiver herein, do have and recover from the said Frank Benjamin the sum of \$66.00 and have execution therefor.
- (4) That the motion heretofore filed herein on behalf of Frank Benjamin to vacate the said order of the Honorable Joseph B. David, entered on Aug. 30, 1932, be and the same is hereby denied.
- (5) That except as hereinbefore modified the said order of the said Honorable Joseph B. David heretofore entered on Aug. 30, 1932, be and the same is hereby in all respects confirmed."

Practically all of the argument of plaintiff in error

Benjamin is devoted to the contention that the order entered by Judge David, on August 30, 1932, was "surreptitiously" obtained and that Judge David should have promptly set the same aside upon plaintiff in error's motion, made on September 1, 1932. It is entirely unnecessary to consider the labored argument that the order in question was "surreptitiously" entered. Nor is it necessary for us to consider the merits of that order, for it appears that on September 1, 1932, Judge David entered the following order:

"This after coming on to be heard this day by the court in accordance with the order heretofore entered, setting this case for hearing, and it appearing to the court that certain objections filed on behalf of Frank Benjamin to the report of Dennis E. Sullivan, Jr., Master in Chancery heretofore filed herein were ordered to stand as objections to said report, and it further appearing to the court that on August 3, 1932, a certain order was entered herein by the Honorable Judge David Laidlaw, Judge of this Court, and on or about the first day of September, 1932, the said Frank Benjamin, by his solicitor, moved the court to vacate the order of the said Judge David entered on August 30, 1932, and upon hearing the said motion the same was, on motion of solicitor for Frank Benjamin, referred to the Honorable Judge E. Sullivan Jr., Master in Chancery of this Court, to take proofs and report his conclusions of law and facts thereon to this Court, and now this matter coming on to be heard on the exceptions to said Master's report filed on behalf of said Frank Benjamin, and the Court having considered said report and having heard the arguments of counsel thereon, finds that the said Report of the said Dennis E. Sullivan Jr., Master in Chancery, should be in all respects confirmed."

"It is therefore, ordered, adjudged and decreed: (1) That the Report of Master in Chancery, Dennis E. Sullivan Jr., heretofore filed herein on July 20th, 1932, be and the same is in all respects confirmed, and the exceptions thereto filed to said Report on behalf of said Frank Benjamin, be and they are hereby overruled."

(2) That the order heretofore entered herein by the Honorable Judge David Laidlaw, on July 20, 1932, be modified so as to strike out the portion thereof reading as follows: "(4) That the report of the said Master herein, do have and recover from the said Frank Benjamin the sum of \$466.00 and have execution therefor." (3) That the report of the said Master herein, do have and recover from the said Frank Benjamin the sum of \$66.00 and have execution therefor. (4) That the motion heretofore filed herein on behalf of Frank Benjamin to vacate the said order of the Honorable Judge David Laidlaw entered on July 20, 1932, be and the same is hereby denied. (5) That except as heretofore modified the said order of the said Honorable Judge David Laidlaw heretofore entered on July 20, 1932, be and the same is hereby in all respects confirmed."

"Accordingly all of the argument of plaintiff in error

Benjamin is devoted to the contention that the error entered by Judge David, on August 30, 1932, was "surpriseously" obtained and that Judge David should have promptly set the same aside upon plain- tiff in error's motion, made on September 1, 1932. It is entirely unnecessary to consider the laborious argument that the order in question was "surpriseously" entered. For it is necessary for us to consider the merits of that error, for it appears that on September 1, 1932, Judge David entered the following order:

"On motion of Solicitor for Frank Benjamin it is ordered that the motion of Frank Benjamin to vacate and set aside the order entered herein on August 30, 1932, be and is hereby referred to Master in Chancery Denis Sullivan Jr. to hear evidence and report his findings and conclusions on the law and facts and report same to this Court including its effect under the order entered by Judge Kavanagh July 22, 1932.

"It is further ordered that said Frank Benjamin shall not be evicted from the premises pending the disposition hereof." (*Italics ours.*)

It will be noted that this order was made upon motion of plaintiff in error Benjamin. The motion was made during the vacation period and at a time when the emergency chancellor was burdened with work, and the reference to the master was designed to bring about a prompt determination of that motion.

The report of the master speaks for itself. No certificate of evidence has been filed in the case, there is nothing in the record to challenge the correctness of the master's findings, and the chancellor was fully justified in sustaining the report. Even if it be assumed that there was a secret understanding between Woodworth and plaintiff in error Benjamin in reference to the lease in question, nevertheless, such understanding, especially in view of the result of plaintiff in error's former connection with the property, would amount to a fraud upon the receiver, the officer of the court, and the chancellor would have the right to disregard the alleged understanding between Woodworth and plaintiff in error, upon which the latter bases his right to possession and control of the premises. In conclusion we may say that we find no warrant in the record to justify plaintiff in error's criticism of Judge David and the solicitors for defendants in error.

Finding no merit in this writ of error, the decretal order of November 7, 1932, is affirmed.

DECRETAL ORDER OF NOVEMBER 7, 1932, AFFIRMED.

Gridley, P. J., and Sullivan, J., concur.

"On motion of plaintiff for leave Benjamin it is ordered that the motion be granted. The order entered herein on August 10, 1933, be and is hereby returned to the court in conformity with the provisions of the rules and regulations of the court and the order entered by the court on July 10, 1933."

"It is further ordered that all such orders shall not be evicted from the premises pending the decision thereof." (Italics added.)

It will be noted that this order was made upon motion of plaintiff in error Benjamin. The motion was made during the vacation period and at a time when the emergency committee was burdened with work and the reference to the master was designed to bring about a prompt determination of the motion.

The report of the master speaks for itself. It contains facts of evidence has been filed in the case, there is nothing in the record to challenge the correctness of the master's findings, and the chancellor was fully justified in accepting the report. Even if it be assumed that there was a clerical mistake in the record between defendant and plaintiff in error Benjamin in reference to the lease in question, nevertheless, such mistake, especially in view of the facts of plaintiff in error's former connection with the property, would amount to a fraud upon the court, and the officer of the court, and the court would have the right to disregard the alleged misunderstanding between defendant and plaintiff in error, upon which the latter bases his right to possession and control of the premises. In conclusion we may say that we find no warrant in the record to justify plaintiff in error's application to Judge Davis and the officials for relief in error.

Nothing no writ in this writ of error, the decretal

order of November 7, 1933, is affirmed.

RECORDED AND INDEXED ON NOVEMBER 7, 1933, AT MEMPHIS.

CLERK, P. J., and SULLIVAN, J., COURT.

37 A
37259

PEOPLE OF THE STATE OF ILLINOIS
ex rel. JOHN S. BUSCH,
(Petitioner) Defendant in Error,

v.

SIMON MANN, BEN MOROWITZ, IDA
ROSENBERG, MOLLIE TALBOT and
HERMAN H. MAGGID,
Respondents.

ERROR TO COUNTY
COURT OF COOK
COUNTY.

SIMON MANN, BEN MOROWITZ and
HERMAN H. MAGGID,
Plaintiffs in Error.

278 I.A. 627⁴

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

There was filed, in the County court of Cook county, by John S. Busch, chief clerk of the board of election commissioners of the city of Chicago, a petition against Simon Mann, Ben Morowitz, Ida Rosenberg, Mollie Talbot and Herman H. Maggid, which recites that on November 8, 1932, a general election was held in Chicago, at which various candidates of different political parties were voted upon; that respondents served as judges and clerks of election at that election in the 9th precinct of the 24th ward; "that certain misconduct and misbehavior which is hereinafter alleged of the said respondents as such judges and clerks of said election at and during said election constitutes a criminal offense or criminal offenses against the People of the State of Illinois, and also constitutes contempt or contempts" of said court; that respondents, while so serving, fraudulently and unlawfully made a false canvass, tally, proclamation and return of the votes so cast in said precinct at said election, and were guilty of corrupt and fraudulent conduct and practice in their duties as judges and

REPORT OF THE JURY ON THE TRIAL OF
JOHN J. HENRY, et al.,
(Indictment)

STATE OF ILLINOIS
COUNTY OF COOK
JURY

JOHN J. HENRY, et al.,
Defendants,
vs.
The People of the State of Illinois,
Prosecutors.

§ 8 I.A. 627

JOHN J. HENRY, et al.,
Defendants,
vs.
The People of the State of Illinois,
Prosecutors.

THE JURY ON THE TRIAL OF THE CASE OF

There was filed in the County Court of Cook County,
by John J. Henry, Clerk of said County, a petition for
of the City of Chicago, a petition for the removal of
the County Court, which petition was filed in the
Court on November 1, 1911, a special election was held in Illinois,
at which various candidates of different political parties were
voted upon. That respondents served as Judges and Clerks of elec-
tion at that election in the City of Chicago, and that
certain respondents and misbehavior which is hereinafter alleged of
the said respondents as such Judges and Clerks of said election at
and during said election constituted a criminal offense or criminal
offenses against the People of the State of Illinois, and also
constituted contempt of said Court; that respondents,
while so serving, fraudulently and unlawfully made a false
entry, a declaration and return of the votes so cast in said
election at said election, and were guilty of contempt and
fraudulent conduct and practices in their duties as Judges and

clerks of said election; that at said election there were 24 candidates for the office of associate judge of the Municipal court of Chicago, of which number 12 were to be elected. The petition sets forth in detail the canvass, tally and return made by the judges and clerks as to each individual candidate for said office and the actual vote cast for each of the candidates for said office, and "that the discrepancies between the returns of the respondents herein and the actual vote cast for each of the candidates for Associate Judge of the Municipal Court of Chicago was caused by and through the fraudulent, corrupt and unlawful acts of said respondents herein." The petition prays that a rule be entered upon respondents to show cause why they should not be held in contempt of court, and such a rule was entered.

It was admitted that at the said election respondents Mann and Rosenberg served as Republican judges of election, respondent Morowitz as a Democratic judge, and that respondents Talbot and Maggid served as Democratic clerks of election.

On hearing of evidence in open court each of the respondents was found "guilty of misconduct and misbehavior as an officer of the County Court of Cook County." Morowitz was sentenced to the county jail for the period of one year, Maggid for the period of 90 days, Talbot for the period of 20 days, Rosenberg for the period of 30 days, and ^{Mann} /for the period of 90 days. This writ of error, No. 37,259, was sued out by respondents Morowitz, Maggid and Mann. A like writ of error, No. 37,267, was sued out by respondents Rosenberg and Talbot and consolidated for hearing in this court with the first one.

Respondents contend that the finding and judgment are contrary to the weight of the evidence. Respondents argue that the case for petitioner depends upon the testimony of Rounds,

clocks of said election; that it was alleged there were 24
 candidates for the office of associate judge of the Municipal
 Court of Chicago, of which number 12 were to be elected. The
 petition was filed in the office of the clerk, duly and return made
 by the clerk and clerk to each individual candidate for said
 office and the said clerk for each of the candidates for
 said office, and that the discrepancies between the returns of
 the respondents herein and the actual vote cast for each of the
 candidates for associate judge of the Municipal Court of Chicago
 was caused by and through the fraudulent, corrupt and unlawful
 vote of said respondents herein. The petition prays that a rule
 be entered upon respondents to show cause why they should not be
 held in contempt of court, and such a rule was entered.

It was admitted that at the said election respondents
 Mann and Rosenberg served as Tally Clerk Judges of election,
 respondents Kovvits as a Democratic Judge, and that respondents
 Talbot and Talbot served as Democratic clerks of election.

In hearing of witnesses in open court each of the
 respondents was found "guilty of misconduct and misdemeanor as
 an officer of the County Court of Cook County." Respondents was
 sentenced to the County Jail for the period of one year, Mann
 for the period of 90 days, Talbot for the period of 90 days,
 Mann
 Rosenberg for the period of 30 days, and for the period of 30
 days. This writ of error, No. 27,359, was sued out by respondents
 Kovvits, Talbot and Mann. A like writ of error, No. 27,367, was
 sued out by respondents Rosenberg and Talbot and consolidated for
 hearing in this court with the first one.

Respondents contend that the finding and judgment are
 contrary to the weight of the evidence. Respondents argue that
 the case for petition depends upon the testimony of Mann,

the handwriting expert. Upon the hearing it was shown that after the election in question there was an election contest case entitled Heller v. Hasten, conducted before Judge Mangan, which involved a recount of the ballots cast in the precinct in question for associate judges of the Municipal court of Chicago. During that recount the ballots cast in the precinct in question were numbered, on the reverse side, 1 to 470, inclusive. These ballots were produced in the instant proceeding by petitioner, and respondents stipulated that the ballots were in the care and custody of petitioner. Margaret Lannan testified that the ballots were the same that witness Rounds had previously examined. Rounds testified, inter alia, that when he made the said examination he found that the ballots had been numbered; that he examined each ballot separately and made a memorandum of his findings; that he found that the ballots had been divided into five groups, one of 101 ballots, one of 79 ballots, one of 17 ballots, one of 3 ballots, and one of 13 ballots; that in the 101 group he found that 19 ballots had been marked by only one person; that the other 82 ballots had crosses on them that were made by more than one person; that in the 79 group there were 7 ballots that had been marked by only one person and 72 ballots that had been marked by more than one person. The witness made no summary of the 13 and 17 groups. The respondents contend that the ballots were not received in evidence as exhibits and that Rounds "did not make an analysis of the ballots before the trial court." The ballots were in court during the examination of Rounds, and counsel for respondents moved that they be impounded as exhibits and made a part of the record. The trial court stated that he would take the motion under advisement and if the respondents needed a record he would pass upon the motion at that time. Counsel for petitioner objected to the ballots being made a part of the record. At the conclusion

the handwriting expert. Upon the hearing it was shown that after the election in question there was an election contest case entitled Waller v. Waller, conducted before Judge Johnson, which involved a recount of the ballots cast in the precinct in question for associate judges of the United States of Chicago. Having that recount the ballots cast in the precinct in question were made, on the reverse side, 1 to 25, inclusive. These ballots were produced in the instant proceeding by petitioner, and respondents objected that the ballots were in the care and custody of petitioner. Respondent Johnson testified that the ballots were the same that Judge Johnson had previously examined. Respondent testified, under oath, that he made the said examination in 1904, that the ballots had been numbered; that he examined each ballot separately and made a memorandum of his findings; that he found that the ballots had been divided into five groups, one of 101 ballots, one of 75 ballots, one of 17 ballots, one of 6 ballots, and one of 13 ballots; that in the 101 group he found that 19 ballots had been marked by only one person; that the other 82 ballots had crossed or been that were made by more than one person; that in the 75 group there were 7 ballots that had been marked by only one person and 68 ballots that had been marked by more than one person. The witness made no summary of the 13 and 17 groups. The respondents contend that the ballots were not received in evidence as exhibits and that records did not make an analysis of the ballots before the trial court. The ballots were in court during the examination of counts, and counsel for respondents moved that they be introduced as exhibits and made a part of the record. The trial court stated that he would take the motion under advisement and if the respondents needed a record he would pass upon the motion at that time. Counsel for petitioner objected to the ballots being made a part of the record. At the conclusion

of the evidence it was stipulated by petitioner and respondents that photostatic copies of the ballots might be received and incorporated in the bill of exceptions, and an order was entered to that effect. In the bill of exceptions we find photostatic copies of the face and reverse sides of the 470 ballots. That the 470 ballots brought into court at the hearing were the ballots returned by the precinct election officials to the election commissioners' office as the ballots cast at the election in question is evident from the fact that each ballot is initialed, as the law requires, by one of the election judges. If there had been any question as to the genuineness of the ballots brought into court, respondents Morowitz, Mann and Rosenberg, election judges, had full opportunity to dispute the initials upon the ballots. None of them, in testifying, questioned the genuineness of the ballots. While Rounds, in giving his testimony, referred to the ballots by number, both petitioner and respondents were given the right and opportunity to call his attention to the ballots, which were before the trial court. In fact, counsel for respondents required the witness at one time to examine a certain ballot and to testify in reference to the same without the aid of his memoranda and the witness was cross-examined at length in reference to the ballot, and counsel had the opportunity, if he cared to exercise it, to cause the witness to testify as to all the ballots solely from an inspection of the same. The record shows that the trial court inspected the ballots and at the conclusion of the evidence for petitioner stated that as to "large numbers of the ballots," each had been marked by more than one person and that the fraudulent markings on the ballots had been placed on them while they were in the custody of the precinct election officials "because they counted them with these marks on them," and that as the ballots were in the custody and control of

of the void was it was stipulated by both sides and respondents that photostatic copies of the ballots will be received and incorporated in the bill of exceptions, and an order was entered to that effect. In the bill of exceptions we find photostatic copies of the ballots and the voids of the 477 ballots. That the 477 ballots presented into court at the hearing were the ballots returned by the precinct inspectors outside to the election commissioners; office as the ballots come at the election in question in which from the fact that each ballot is initialed, as the law requires, by one of the election judges. If there had been any question as to the genuineness of the ballots presented into court, respondents, both the respondents, election judges, had full opportunity to dispute the initials upon the ballots. None of them, in testifying, questioned the genuineness of the ballots. While counsel, in giving his testimony, referred to the ballots by number, both petitioners and respondents were given the right and opportunity to call his attention to the ballots, which were before the trial court. In fact, counsel for respondents examined the witness at one time to examine a certain ballot and to testify in reference to the same without the aid of his notebook and the witness was cross-examined at length in reference to the ballot, and counsel had the opportunity, if he cared to exercise it, to cross-examine the witness as to all the ballots solely from an inspection of the same. The record shows that the trial court instructed the ballots and the constitution of the evidence for petitioners stated that as to "large numbers of the ballots," each had been marked by some other person and that the fraudulent markings on the ballots had been placed on them while they were in the custody of the precinct election officials "because they counted them with these marks on them," and that the ballots were in the custody and control of

the precinct election officials he thought it only fair to the respondents to say that he would like to hear from them and have their explanations as to the conditions found upon the ballots.

Respondents introduced testimony to the effect that no voter asked for aid in marking his ballot and that no one accompanied any voter into a voting booth; that no one but the judges had the custody and control of the ballots during the election; that it was not possible for a voter to go from one booth to another booth; that no one but the voters placed any marks on any of the judicial ballots except the judge who placed his initials on the back of a ballot. The judges testified that the clerks did not handle the ballots and that they apparently tallied the votes in accordance with the announcements made by the judges. Respondents Maggid and Talbot, clerks of election, testified that they did not handle any of the ballots; that they tallied the votes exactly as they were called by the judges and that they would have objected had they seen any evidence of fraud on the part of the judges. That many ballots were improperly counted, even if the testimony that the crosses upon the same were made by more than one person be disregarded, clearly appears from the testimony of the respondents who acted as judges. The position of the respondents was that the mistake in counting was an honest one. Each of the respondents denied placing any marks upon the face of the ballots and each denied any knowledge of fraudulent or improper conduct on the part of any of the other officials. Respondent Mann testified that he had attended Judge Jarecki's school of instruction for election officials, that he had the printed book of instructions issued by the County court for the benefit of election officials, and that he had studied the same. Respondent Rosenberg testified that she understood what her duties as a judge of election were. Respondent Morowitz

[illegible]

testified that he had served as a judge of election prior to the election in question; that the night before the election in question the precinct captain, Hymie Goldberg, told him "there would be a vacancy," and asked him to come to the polling place and serve as one of the judges; that he appeared at the polling place in question in the morning and was sworn in to act as a judge of election; that he, the witness, had before that time gone to the precinct captain and asked him if he could not be appointed an election official.

Counsel, in their argument, erroneously assume that the instant case necessarily involves a charge of forgery against respondents, and have cited numerous cases bearing upon the subject of forgery. The charge against respondents is that they fraudulently and unlawfully made a false canvass, tally, proclamation and return of the votes cast in said precinct at said election and that they were guilty of corrupt and fraudulent conduct and practice in their duties as judges and clerks of said election. The theory of the petitioner is that it is not essential that the proof show that a respondent placed marks on the ballots; that the proof shows that marks were placed on the ballots by persons other than the voters and that such improper and illegal marking was done with the knowledge and acquiescence of the respondents. The respondents contend that the testimony of Rounds is entitled to little, if any, weight. Rounds testified that he was an examiner of disputed documents and had been so engaged for twenty-seven years; that he had made examinations and rendered opinions in 2,500 disputed document cases; that he had testified in over 200 cases; that he was the official handwriting expert for the American Protective League working for the Department of Justice during the World War; that he was handwriting expert for

...that he had never ... of ... prior to the ... in question ... the ... said his ... will be a ... of the ... and ... in ... of the ... and he ... in ... of ... in the ... to be ... of ... that he ... and ... to the ... and when he ... an ... official.

... in ... extremely ... that the ... instant ... a charge of ... responsibility ... and ... the ... of ... The ... in ... and ... the ... of the ... and ... of ... and ... of ... and ... of ... in their ... of ... of ... the ... in that it is not ... that the ... place on ... the ... that the ... placed on the ... by ... and ... and ... of the ... that the ... of ... is ... it ... of ... and had been ... for ... that he had made ... and ... in ... that he had ... in over ... that he was the ... for the ... for ... and he was ... for

the government in the I. W. W. cases tried before Judge Landis in 1918, and that he had been called as a handwriting expert in many other famous criminal cases. The respondents had ample opportunity to introduce expert testimony in rebuttal of his evidence, but they did not do so. They now claim that they were not given proper notice that petitioner intended, as part of its case, to introduce the testimony of Rounds. This is an afterthought. When Rounds was called as a witness counsel for respondents merely stated that he "did not know much about Mr. Rounds' qualifications," and thereupon petitioner proceeded to qualify the witness, and subsequently thereto no objection of any kind was made to his testifying. The trial court saw the witness and was best qualified to judge of his credibility. In addition, the trial court stated that he found from an inspection of the ballots that they corroborated the testimony of Rounds. After a careful examination of the ballots we find ourselves in accord with the court's finding in that regard. We are satisfied that the judgment of the court, finding respondents Mann, Morowitz and Rosenberg guilty of misconduct and misbehavior as officers of the County court of Cook county, is fully justified by the proof. The City Election law places the responsibility of the conduct of the election, the canvass of the votes and the return of the ballots cast, upon the judges. The clerks are not permitted to count the ballots nor to handle them. Each of the judges handled ballots, initialed certain of them, took part in the counting of the judicial ballots and the announcements made to the clerks, and each of the judges testified that no one save the voters and the judges handled the ballots at any time. As the undisputed evidence shows that crosses were placed on many ballots by persons other than the voters, the only reasonable conclusion that can be drawn from the facts and circumstances is that such

the government in the U. S. Court of Appeals for the Second Circuit in 1910, and that he had been called as a witness, except in many other known original cases. The government had ample opportunity to introduce expert testimony in rebuttal of his evidence, but they did not do so. They now claim that they were not given proper notice that petitioner intended, as part of his case, to introduce the testimony of himself. This is an oversight. When bonds were called as a witness connected for respondent's case, it was stated that he did not know about Mr. Bonds' qualifications, and therefore upon petitioner proceeded to notify the witness, and subsequently there was objection of his being called as a witness. The trial court saw the witness and was not qualified to judge of his credibility. In addition, the trial court stated that he turned from an inspection of the ballot box they corroborated the testimony of Bonds. Then a complete examination of the ballot box and ourselves in accord with the court's finding in that regard. We are satisfied that the judgment of the court, finding respondents Mann, Kozlovic and Rosenborg guilty of misconduct and misbehavior as officers of the County Court of Cook County, is fully justified by the facts. The City Election Law places the responsibility of the conduct of the election, the canvass of the votes and the return of the ballot box, upon the judges. The clerks are not permitted to count the ballots nor to handle them. Each of the judges handled ballots, indicated certain of them, took part in the counting of the judicial ballots and the announcements made to the clerks, and each of the judges testified that no one gave the voters and the judges handled the ballots at any time. As the undisputed evidence shows that crosses were placed on many ballots by persons other than the voters, the only reasonable conclusion that can be drawn from the facts and circumstances is that each

crosses were placed on the ballots with the knowledge and acquiescence of the judges. We are of the opinion, however, that the judgment of the trial court finding respondents Maggid and Talbot guilty is not warranted by the evidence, as there is no fact or circumstance in the case from which it can be reasonably inferred that they knew that crosses were placed on ballots by persons other than the voters or that the judges were not making honest announcements of the votes cast. In People ex rel. Rusch v. Rivlin, 277 Ill. App. 183, we sustained a judgment finding the clerks, as well as the judges, guilty, but there it appeared that the clerks knew that there had been no count made of the votes cast but, nevertheless, obeyed the orders of the judges to enter upon the official return sheet certain tallies for various candidates.

Respondents contend that the trial court should have allowed their motion, made prior to the commencement of the trial, that each respondent be allowed a separate trial. There is no merit in this contention. See People v. Madel, 337 Ill. 169, 170, wherein the court held that "a person charged with contempt of court is not entitled to a jury trial of the charge or a trial separate from those charged jointly with him." That case also involved a proceeding to punish for contempt certain election officials under section 13 of art. II of the City Election law.

Respondents contend that the petitioner was obliged to establish the guilt of respondents beyond a reasonable doubt. We held in People ex rel. Rusch v. Rivlin, *supra* (p. 195), that petitioner was not required to prove the guilt of respondents beyond a reasonable doubt. However, even if the principle of law relied upon by respondents is here applicable we are satisfied that petitioner successfully bore the burden imposed by that rule in so far as the charge against respondents Mann, Morowitz and Rosenberg is concerned.

crosses were placed on the ballots with the instructions and
acquiescence of the judges. The act of the judges, however,
that the judgment of the trial court finding respondents liable
and Talbot guilty is not warranted by the evidence, as there is
no fact or circumstance in the case from which it can be reason-
ably inferred that they knew that crosses were placed on ballots
by persons other than the voters or that the judges were not making
honest announcements of the votes cast. In People ex rel. Beach v.
Evlin, 277 Ill. App. 183, we sustained a judgment finding the
other, as well as the judges, guilty, but there is no reason that
the judges knew that there had been no count made of the votes cast
and, nevertheless, obeyed the orders of the judges to enter upon
the official record exact counts calling for various conditions.
Respondents contend that the trial court should have
allowed their motion, made prior to the announcement of the trial,
that each respondent be allowed a separate trial. There is no
error in this contention. See People v. Smith, 277 Ill. App. 183, 184,
wherein the court held that "a person charged with contempt of
court is not entitled to a jury trial of the charge on a trial
separate from those charged jointly with him." That court also
involved a proceeding to punish or contempt certain election
officials under section 13 of art. II of the Illinois Constitution.
Respondents contend that the petition was entitled to
establish the guilt of respondents beyond a reasonable doubt. It
held in People ex rel. Beach v. Evlin, supra (1931), that
petitioners were not required to prove the guilt of respondents
beyond a reasonable doubt. However, even if the principle of law
applied upon by respondents is here applicable to the petitioners,
that petitioners necessarily bear the burden imposed by the rule
in so far as the charges against respondents herein, respondents and
respondent is concerned.

Respondents contend that the judgment order is void in that it fails to recite that the respondents were present in open court at the time of the entry of the judgment order. There is no merit in this contention, as the judgment order recites that each of the respondents appeared personally in court, and by their counsel, at the time of the entry of the judgment order.

The judgment order of the County court of Cook county in so far as it applies to respondents Simon Mann and Ben Morowitz, is affirmed; and in so far as that order applies to respondent Herman H. Maggid the cause is reversed and remanded.

JUDGMENT ORDER AS TO RESPONDENTS
SIMON MANN AND BEN MOROWITZ AFFIRMED;
AS TO RESPONDENT HERMAN H. MAGGID,
CAUSE REVERSED AND REMANDED.

Gridley, P. J., and Sullivan, J., concur.

in so far as it applies to respondents Simon and Ben Gordon, it is affirmed; and in so far as that order applies to respondent

37267

38 7

PEOPLE OF THE STATE OF ILLINOIS
ex rel. JOHN S. BUSCH,
(Petitioner) Defendant in Error,

v.

SIMON MANN, BEN MOROWITZ, IDA
ROSENBERG, MOLLIE TALBOT, HERMAN
H. MAGGID,
Respondents.

ERROR TO COUNTY
COURT OF COOK
COUNTY.

IDA ROSENBERG and MOLLIE TALBOT,
Plaintiffs in Error.

273 I.A. 628

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing with case No. 37259, People of the State of Illinois ex rel. John S. Busch v. Mann et al., in which we have this day filed an opinion and in which the pleadings and material facts involved in the instant case are stated. We have in that opinion set forth our conclusions touching the matters involved in the writ of error in the instant case, and for the reasons there stated the judgment order of the County court of Cook county in the instant case, No. 37267, in so far as it applies to respondent Ida Rosenberg, is affirmed, and in so far as that order applies to respondent Mollie Talbot the cause is reversed and remanded.

JUDGMENT ORDER AS TO RESPONDENT IDA ROSENBERG
AFFIRMED; AS TO RESPONDENT MOLLIE TALBOT,
CAUSE REVERSED AND REMANDED.

Gridley, P. J., and Sullivan, J., concur.

37287

REPORT OF THE STATE OF ILLINOIS
EX REL. JOHN A. BUSH,
(Petitioner) Defendant in Error,

v.

WILLIAM KEMME, BENJAMIN C. BROWN,
JAMES H. BROWN, WILLIAM T. BROWN,
JAMES H. BROWN, WILLIAM T. BROWN,
JAMES H. BROWN, WILLIAM T. BROWN,

STATE OF ILLINOIS
COUNTY OF COOK
COURT OF COMMON PLEAS

37287 I.A. 623

THE HONORABLE AND WISE JUDGES OF THE
COURT OF COMMON PLEAS IN COOK COUNTY

MR. JUSTICE BROWN RECEIVED THE ORDER OF THE COURT

This case was consolidated for hearing with case

No. 37287, People of the State of Illinois ex rel. John A. Bush

v. James H. Brown, in which we have this day filed an opinion and

in which the pleadings and material facts involved in the instant

case are stated. We have in that opinion set forth our con-

clusions regarding the matters involved in the writ of error in

the instant case, and for the reasons there stated the judgment

of the County Court of Cook County in the instant case,

No. 37287, in so far as it applies to respondent James H. Brown,

is affirmed, and in so far as it applies to respondent

William T. Brown the same is reversed and remanded.

IT IS ORDERED THAT THE COSTS OF THIS CASE BE PAID BY THE
PETITIONER AS TO HIS PORTION OF THE COSTS,
AND BY THE DEFENDANTS AS TO THEIR PORTION OF THE COSTS.

Witness my hand and seal this 1st day of January, 1900.

37456

ANNA SNYDER,
Appellee,

v.

THE PRUDENTIAL INSURANCE
COMPANY OF AMERICA, a
corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

270 I.A. 628²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant upon four industrial life insurance policies issued by defendant on the life of Ruth E. Grider, sister of plaintiff. A jury returned a verdict finding the issues against defendant and assessing plaintiff's damages at the sum of \$2,500. Defendant appeals from a judgment entered upon the verdict.

Plaintiff's statement of claim is, in substance, as follows: That Ruth E. Grider, prior to her death, took out four life insurance policies with defendant, the numbers and face values of the policies being as follows: #46537069, \$252; #49005947, \$246; #67638438, \$544, and #92769743, \$159; that by the terms of the policies defendant became liable to pay, upon the death of Ruth E. Grider, the face value of the policies, and upon the death of the latter by accidental means defendant became liable to pay double the face value of the policies, or \$2,500; that the policies provide that upon the death of Ruth E. Grider defendant promises to pay to the executor or administrator of her estate, or to any person appearing to defendant to be equitably entitled to the same, the benefits under the policies; that Ruth

E. Grider died on November 13, 1932; that her death was caused by her accidentally taking an overdose of veronal, commonly known as a sleeping potion; that at the time of her death the four policies were in full force and effect and defendant became liable to pay a death benefit under the policies double the amount of the face value, or \$2,500; that prior to her death she made an assignment of the benefits under the policies to her sister, plaintiff, and in pursuance of the assignment Ruth delivered the four policies to plaintiff; that Garvin Grider, the husband of Ruth, by fraud and misrepresentation, secured the policies from plaintiff and subsequently presented them to defendant in his own name and claimed the benefits thereunder; that prior to any payment to Garvin Grider on the policies, plaintiff notified defendant of the assignment of the policies to her, also notified defendant that Garvin Grider had obtained the policies through fraud and misrepresentation, and notified defendant that the benefits under the policies should be paid to plaintiff and not to Garvin Grider; that at the time plaintiff notified defendant of the said assignment and of the obtaining of the policies by Garvin Grider, defendant promised plaintiff that it would see to it that the benefits would be paid to her; that she repeatedly demanded of defendant the payment of the benefits under the policies to plaintiff, but that defendant refused and continues to refuse to pay any money whatsoever to her under the policies. "To the damage of plaintiff in the sum of \$2,500, wherefore she brings this suit." Defendant's amended affidavit of merits is as follows:

"Frank J. Brach being first duly sworn, on oath deposes and says that he is the duly authorized agent of the defendant corporation in this behalf; that he has knowledge of the facts and that he verily believes the defendant has a good defense, upon the merits to the whole of the plaintiff's demand,

"Affiant states that the defense of the defendant is as follows:

"1. Affiant states that it did not enter into any

H. Gridin died on November 1, 1933; his last will was dated by her accidentally taking an overdose of vitamin, whereby she was in a sleeping position; that at the time of her death and her policies were in full force and effect and defendant became liable to pay a death benefit under the policies double the amount of the face value, or \$2,500; that prior to her death she made an assignment of the benefits under the policies to her sister, Plaintiff, and in pursuance of the assignment cashed the four policies to Plaintiff; that Gavin Gridin, the husband of Plaintiff, by fraud and misrepresentation, secured the policies from Plaintiff and subsequently presented them to defendant in his own name and claimed the benefits thereunder; that prior to any payment to Gavin Gridin on the policies, Plaintiff notified defendant of the assignment of the policies to her, also notified defendant that Gavin Gridin had obtained the policies through fraud and misrepresentation, and notified defendant that the benefits under the policies should be paid to Plaintiff and not to Gavin Gridin; that at the time Plaintiff notified defendant of the said assignment and of the obtaining of the policies by Gavin Gridin, defendant promised Plaintiff that it would see to it that the benefits would be paid to her; that she repeatedly demanded of defendant the payment of the benefits under the policies to Plaintiff, but that defendant refused and continued to refuse to pay any money whatsoever to her under the policies. To the damage of Plaintiff in the sum of \$2,500, wherefore she prays this writ. Defendant's amended affidavit of merits

is as follows:

"I, Frank J. Hirsch being first duly sworn, on oath depose and say that he is the duly authorized agent of the defendant corporation in this matter; that he has knowledge of the facts and that he truthfully relates the content of his deposition, upon the basis of the whole of the Plaintiff's demand."

"I further state that the balance of the deposition is as follows:

"I further state that it did not enter into any

contractual relationship with the plaintiff in this case, and, therefore, it is not indebted to the plaintiff in any sum whatsoever.

"2. Affiant further states that the policies in the statement of claim mentioned provide, among other things, as follows:

"Facility of Payment. - It is understood and agreed that the said Company may make any payment or grant any non-forfeiture provision provided for in this Policy to any relative by blood or connection by marriage of the Insured, or to any person appearing to said Company to be equitably entitled to the same by reason of having incurred expense on behalf of the Insured, for his or her burial, or for any other purpose and the production by the Company of a receipt signed by any or either of said persons or of other sufficient proof of such payment or grant of such provision to any or either of them shall be conclusive evidence that such payment or provision has been made or granted to the person or persons entitled thereto, and that all claims under this Policy have been fully satisfied."

"And affiant states that the defendant did pay Garvin D. Grider, the husband of the insured, the proceeds of the said policies sued upon and that the said Garvin D. Grider appeared to the said defendant to be equitably entitled to the proceeds of said policies and that the Company has a receipt signed by the said Garvin D. Grider and that the said payment and said receipt is conclusive evidence that said payment has been made and granted to the person entitled thereto and that all claims under said policies have been satisfied."

"3. Affiant further states that the policies of insurance sued upon provide, among other things, as follows:

"In consideration of the payment of the weekly premium herein specified, on or before each and every Monday during the continuance of this Policy or until the anniversary date of the Policy immediately preceding the seventieth anniversary of the birth of the Insured, will pay at its Home Office, Newark, New Jersey, immediately upon receipt of due proof of the death of the Insured during the continuance of this Policy, the amount of insurance herein specified, to the executors or administrators of the Insured."

and affiant states that the defendant paid the sum of One Thousand Two Hundred Fifty-one Dollars and Thirty Cents (\$1,251.30), the face amount of the policies, to Garvin D. Grider, Administrator of the Estate of Ruth E. Grider, deceased, and husband of the insured and also paid the sum of Eight Hundred Fifty Dollars (\$850.00) to Garvin D. Grider, Administrator of the Estate of Ruth E. Grider, deceased, and husband of the insured in settlement of the Accidental Death Benefits under the said policies of insurance and for which amount a judgment was entered in the Municipal Court of Chicago in the case of Garvin D. Grider, Administrator of the Estate of Ruth E. Grider, deceased v. The Prudential Insurance Company of America, a corporation, Number 2765039, which judgment was satisfied in open court on June 20, 1933.

"Therefore, the defendant says that it is not indebted to this plaintiff in the sum of Twenty-five Hundred Dollars or any other amount."

The policies sued upon are known as industrial life insurance policies and are payable to the administrator or executor of the insured, but they contain the so-called facility of payment clause, by which defendant has the option of paying the proceeds of the policy to a

contractual relationship with the plaintiff in this case, and, therefore, it is not intended to be the plaintiff in any way.

"3. Plaintiff further states that the policies in the statement of claim mentioned provide, among other things, as follows:

"Society of Friends - It is understood and agreed that the said company may make any payment or grant any non-forfeiture provision provided for in this policy to any relative by blood or connection by marriage of the insured, or to any person agreeing to such company to be a beneficiary in the same by reason of having incurred expenses on behalf of the insured, for his or her burial, or for any other purpose and the production by the company of a receipt signed by any of either of said persons or of other sufficient proof of such payment or grant of such provision to any of either of them shall be conclusive evidence that such payment or provision has been made or granted to the person or persons entitled thereto, and that all claims under this policy have been fully satisfied."

"Plaintiff states that the defendant did pay Garvin D. Grider, the husband of the insured, the proceeds of the said policy and that the said Garvin D. Grider appeared to the said defendant to be lawfully entitled to the proceeds of said policy, and that the company has a receipt signed by Garvin D. Grider and that the said payment and said receipt is conclusive evidence that said payment has been made and granted to the person entitled thereto and that all claims under said policy have been satisfied."

"3. Plaintiff further states that the policies of insurance used upon provide, among other things, as follows:

"In consideration of the payment of the weekly premium herein specified, on or before each and every Monday during the continuance of this policy or until the anniversary date of the policy immediately preceding the next anniversary of the birth of the insured, I'll pay at its Home Office, New York, New Jersey, immediately upon receipt of the proof of loss of the insured, and the continuance of this policy, the amount of insurance herein specified, to the executor or administrator of the insured."

"and Plaintiff states that the defendant did pay the sum of one thousand two hundred fifty-one dollars and thirty cents (\$1,251.30), the face amount of the policy, to Garvin D. Grider, administrator of the estate of Ruth M. Grider, deceased, and husband of the insured and also paid the sum of eight hundred fifty dollars (\$850.00) to Garvin D. Grider, administrator of the estate of Ruth M. Grider, deceased, and husband of the insured in settlement of the indebtedness of the defendant under the said policies of insurance and for which amount a judgment was entered in the Municipal Court of Chicago in the case of Garvin D. Grider, administrator of the estate of Ruth M. Grider, deceased v. Industrial Insurance Company of America, a corporation, number 123033, which judgment was satisfied in full on June 30, 1933."

"Therefore, the defendant says that it is not intended to this plaintiff in the sum of twenty-five hundred dollars or any other amount."

The policies and upon are known as Industrial life insurance policies and are payable to the administrator or executor of the insured, and they contain the provision of payment clause, by which defendant has the option of paying the proceeds of the policy to a

person who is equitably entitled to receive the insurance, provided, as plaintiff contends and defendant admits, defendant acts in good faith in making the payment. Plaintiff's theory of fact was that defendant had recognized her as equitably entitled to receive the insurance and had promised to pay her the proceeds of the policies. The theory of fact of defendant was that it did not recognize plaintiff as equitably entitled to the proceeds of the policies and that it did not promise to pay her the proceeds of the policies. That defendant paid the proceeds of the policies to Garvin Grider, the husband of the deceased and the administrator of her estate, is conceded.

In support of its contention that the judgment should be reversed and remanded, defendant has argued many points. We need refer to but one. Defendant contends that the verdict and judgment of the trial court are contrary to the manifest weight of the evidence. After a very careful consideration of all the evidence, we have reached the conclusion that the instant contention is a meritorious one. As the case may be tried again, we purposely refrain from analyzing and commenting upon the facts and circumstances in evidence.

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Gridley, P. J., and Sullivan, J., concur.

person who is a legally entitled to receive the insurance, provided
 he claims it, contends and demands it, and he is in good
 faith in making his demand. The theory of that is that
 defendant has assumed that he was legally entitled to receive the
 insurance and has promised to pay for the proceeds of the policies.
 The theory of that of defendant is that he has not recognized plain-
 tiff as a legally entitled to the proceeds of the policies and that
 it did not promise to pay for the proceeds of the policies. That
 defendant says the proceeds of the policies to David Green, the
 husband of the deceased and the administrator of her estate, is
 contested.

In regard of its contention that the insurance should be
 returned and refunded, it does not have any points to need
 to be put out. Defendant contends that the verdict and judgment
 of the trial court are contrary to the manifest weight of the evi-
 dence. It is a very serious consideration of all the evidence, we
 have reviewed the evidence and the instant contention is a
 serious one. As the case may be tried again, we purposely
 refrain from analyzing and commenting upon the facts and circum-
 stances in evidence.

The judgment of the Circuit Court of Chicago is

reversed and the cause is remanded for a new trial.

WILLIAM C. WELLS, J.

GRIDLEY, J. J., and MILLER, J. J., concur.

37485

JULIUS LUHRSEN, Administrator
of the Estate of Alfred L. Muller,
Deceased,

Appellee,

v.

JOHN MARCUS and FRANK W. GLEN,
Appellants.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

273 I.A. 628³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action on the case brought by the administrator of the estate of Alfred L. Muller, deceased, for damages for the wrongful death of his intestate. Interline Freight Company, a corporation, was originally a defendant, but at the close of all the evidence plaintiff dismissed the suit as to it. A jury returned a verdict finding defendants Glen and Marcus guilty and assessing plaintiff's damages at the sum of \$10,000. Defendants have appealed from a judgment entered upon the verdict.

Defendant Glen was engaged in hauling freight for the Interline Freight Company from Chicago to various points. Defendant Marcus, an employee of Glen, was a licensed chauffeur and had made many trips in the line of his employment. On December 17, 1931, Marcus, with a truck and trailer, left for St. Louis with a load of freight. The truck and trailer were thirty-one feet long, the trailer was seven feet wide, and they were, at that time, in good working condition. The trailer was loaded with six or seven thousand pounds of freight. After delivering his load in St. Louis Marcus took on a load, for Chicago, of six or seven thousand pounds. He left St. Louis on Saturday night, December 19, about

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The following information was obtained from the records of the Bureau of Motor Vehicle Registration, State of New York, regarding the registration of motor vehicles in the State of New York during the year 1960:

A total of 1,234,567 motor vehicles were registered in the State of New York during the year 1960.

The number of motor vehicles registered in the State of New York by type of vehicle was as follows:

| Type of Vehicle | Number Registered |
|-----------------|-------------------|
| Passenger Cars | 876,543 |
| Light Trucks | 234,567 |
| Heavy Trucks | 123,456 |
| Buses | 54,321 |
| Motorcycles | 23,456 |
| Other Vehicles | 12,345 |

The above information was obtained from the records of the Bureau of Motor Vehicle Registration, State of New York, and is subject to change without notice.

eight or nine o'clock, and drove to Mattoon, Illinois, where he spent the night. The following morning, on the way north, the generator on the truck burned out. He was unable to have it repaired, as it was Sunday, but he purchased a new battery en route and continued towards Chicago. About eleven o'clock a. m. he picked up a young man named Martin Nadai. Marcus drove the truck northward at the rate of about thirty miles an hour until he reached Monee, "anywhere between 4:40 and 4:45," where he turned on the rear lights on the trailer, but because it was still twilight he did not turn on the headlights. He left Monee at approximately the same rate of speed and was proceeding north on route 49 when the engine began to sputter, due to the fact that the gasoline tank was running dry, and he pulled the truck over to the edge of the outer lane of route 49, stopped the truck, and set the brake. The shoulder of the highway was soft and muddy and would not support the weight of the truck and trailer. He was then about two miles north of Monee and approximately 1,800 feet beyond route 50, which joins route 49 in a Y. Route 49 was an improved, concrete highway, forty feet in width, with four traffic lanes, two for northbound and two for southbound automobiles. Plaintiff was traveling north, in a Nash automobile, in the outer or right-hand lane, at a speed, as he estimates it, of forty to forty-five miles an hour. At the time of the accident and prior thereto, he had only dim headlights burning, which would not show for more than fifty or sixty feet. After stopping the truck, Marcus switched off the tail lights so as to conserve the battery and enable him to start the engine. He had made the connection and was in front of the truck, in the act of, or about to crank the engine, when the rear of the trailer was run into by the car driven by plaintiff, in which plaintiff's intestate, his nephew, was riding in the right front seat. The impact when

eight or nine o'clock, and drove to Jackson, Illinois, where he spent the night. The following morning, on the way home, the observation on the trunk burned out. He was unable to have it repaired, as it was empty, but he purchased a new battery on the way and continued on his trip. About eleven o'clock a. m. he picked up a young man named Martin Kebab. Martin Kebab was traveling at the rate of about thirty miles an hour when he reached Kansas. Kebab's car was a 1924 and 1925, which he carried on the rear lights on the trailer, but because it was still in the shop he did not turn on his headlights. He left Kansas at approximately the same rate of speed and was proceeding north on route 42 when the engine began to sputter, due to the fact that the gasoline tank was running dry, and he pulled the truck over to the side of the road. He stopped the truck, and sat the driver. The chamber of the highway was wet and muddy and would not support the weight of the car and trailer. He was then about two miles north of Kansas and approximately 1,200 feet beyond route 42, which turns route 42 to the left. The car was an improved, concrete highway, fairly new in design, with two traffic lanes, two for northbound and two for southbound automobiles. Kebab's car was traveling north, in a southbound lane, in the center of right-hand lane, at a speed, as he estimates it, of forty to forty-five miles an hour. At the time of the accident and prior thereto, he had only six headlights operating, which would not show for more than fifty or sixty feet. After stopping the car, Kebab attempted to get the tail lights on as he connected the battery and asked him to start the engine. He had made the connection and was in front of the truck, in the wet of or about to start the engine, when the rear of the trailer was run into by the car driven by Kebab, in which Kebab's car was traveling. His nephew, who was sitting in the right front seat. The impact then

the car ran into the trailer was terrific. The truck and trailer, heavily loaded, with the brake set, were pushed forward a distance of twenty feet. The Nash car was practically cut in two, and it skidded sideways in a northwesterly direction, entirely across the highway, and came to a stop even with or slightly north of the front end of the truck, but on the opposite side of the roadway. Plaintiff's intestate was instantly killed. It is reasonably clear, from the results that followed the impact, that plaintiff was driving at a much greater speed than forty to forty-five miles per hour. The United States weather bureau report showed that the sun set, on that day, at 4:21 p.m. The theory of fact of plaintiff was that the accident happened very close to 5:30 o'clock p.m. The theory of fact of defendants was that the accident happened before 5:21 p.m. The importance of the time of the accident is due to the fact that sec. 16, par. 17, ch. 95a, of the Motor Vehicles act (Cahill's Ill. Rev. St.), as amended in 1923, reads as follows:

"When upon any public highway in this State, during the period from one hour after sunset to sunrise, * * * each motor vehicle, trailer or semi-trailer shall also exhibit at least one lighted lamp which shall be so situated as to throw a red light visible in the reverse direction. * * * (Italics ours.)"

The only evidence as to the actions of the deceased and the driver of the Nash car at the time of the accident and just prior thereto is contained in the testimony of Luhrsen, plaintiff, who drove the automobile. Luhrsen is the administrator in the instant suit. He testified that he drove the Nash coupe that collided with the truck; that he had driven automobiles longer than six years; that he was on the left side of the front seat of the automobile, in the driver's seat, and his nephew sat on the right side of the front seat; that they had occupied that position the entire trip; that the highway at the place in question was forty feet wide and had four lanes; that he had very frequently driven over it and was

familiar with the road; that at the time of the accident the roadway was dry; that "it was a glum, hazy night, rather glum, not raining though. * * * Very dark;" that as he drove north at the time of the accident he was driving between forty and forty-five miles per hour; that the accident happened very close to 5:30 p.m.; that he was driving "on the right, outside lane;" that when he was about fifty feet, "perhaps more," away from the truck he "could just see something dark, some dark outline, we couldn't tell what it was, it looks just so much like pavement, and yet it appeared to me it was something that was not pavement, but you couldn't tell distinctly what it was;" that he had the lights burning on the car; that there were no electric lights or reflecting lights of any kind on the truck as he approached it; that he noticed the truck was covered with a tarpaulin; that as soon as he realized that there was something in front of him apparently different from the regular highway, he turned his car to the left as quickly as he could, so that he might get into the second lane; that he hit the truck, which was standing in the outside lane, at the left-hand corner with the right-hand side of his car; that his automobile skidded in a northwesterly direction on the highway along the south lane of traffic; that he could not say how far his car skidded after it came in contact with the trailer, but he remembers that his car stopped practically even with the front of the truck; that his nephew was killed instantly; that when he first saw the truck he could not tell whether it was in motion but that he believed that it was; that the pavement was dry; that from his experience in driving cars, with conditions such as then prevailed and driving at the rate of speed that he was then driving, he could stop his car in thirty or thirty-five feet easily. On cross-examination he testified that his nephew had made the same trip with him once or

twice before; that the brakes of his car, the ignition system and the lighting system were all in good running order; that at the time of the accident he was going at the rate of forty or forty-five miles an hour and could see ahead in the road just as far as his light would throw; that his light would shine fifty feet or more; that there was nothing on the inner northbound lane to prevent him from turning into that lane when he was fifty feet to the rear of the truck; that at the coroner's inquest he stated that the accident happened "between 5:15 and 5:30, I would judge;" that he also then testified that he was a little bit farther than twelve or fifteen feet away from the truck when he first saw it, that he had his dim lights burning at the time of the accident and that he could see an object in front of him at a distance of twenty-five or thirty feet; that the weather may have been foggy at the time of the accident but that as he recalled it, "it was a hazy, gloomy, dark night;" that at the coroner's inquest he testified that it was a clear night as far as he knew, and not foggy or rainy; that the deceased did not wear glasses, as his eyesight was good; that the speedometer showed on the dashboard of his car, was in operating condition, and perfectly visible to the deceased; that prior to the accident he was looking straight ahead and the deceased was doing the same; that the deceased made no remonstrance, nor made any objection to the speed at which he was driving the car; that the deceased took no part in the driving of the car and made no comments of any kind as to the manner in which it was being driven; that when his headlights first picked up the truck, it was fifty or sixty feet in front of him; that he cannot tell whether he applied the brakes at that time; that he does not think that he turned his steering wheel to the left when he was fifty or sixty feet away from the truck; that when he first observed the truck he did not turn; that he did turn his steering wheel sometime

Justice believed that the witness of his own, the following evidence
 and the following evidence was all in good standing and was all
 the same as the evidence he was giving at the time of the trial.
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 for as his light would show that his light would show that
 that of course that there was nothing in the room that would show
 to prevent the light from being light that was when he was in the room
 to the rear of the truck; that as the evidence's statement he stated
 that the evidence happened to be in the room that was light; that
 that he also stated that he was a little bit further than
 twelve or fifteen feet away from the truck when he was in the room
 that he had his light shining at the time of the accident.
 and that he would see an object in front of him as a statement of
 twenty-five or thirty feet; that the witness was not in the room
 at the time of the accident but that as he stated it, "it was a
 dark night, dark night; that as the evidence's statement he stated
 that that it was a dark night as far as he knew, and not today
 is today; that the evidence did not see him, as his statement
 was good; that the statement showed on the sidewalk of his car,
 was in operation, and partially visible to the witness;
 that prior to the accident he was looking straight ahead and the
 witness was doing the same; that the witness was not in the room,
 but that any objection to the statement which he was giving was
 that that the witness took no part in the driving of the car and
 was no operator of any kind as in the manner in which it was being
 driven; that when the witness first looked at the car, it
 was fifty or sixty feet in front of him; that he could tell whether
 he noticed the truck at that time; that he knew and that that
 he turned his steering wheel to the left when he was fifty or sixty
 feet away from the truck; that when he first observed the truck
 he did not know; that he did turn his steering wheel towards

"when I was between 50 and 60 feet away and the time we struck the truck;" that as to whether he was two, five or ten feet away at the time he turned his steering wheel he could not recall, as "it happened in a flash;" that the right side of his car was ripped out by the impact; that he could not say whether his emergency brake was set at the time of the impact or not. Defendants' evidence tended to show that the weather was clear at the time of the accident and that "it was still light, although turning dark." Or, as one witness put it, "It was not dark at the time of the accident, it was dusk, turning dark." Witnesses for defendants testified, variously, to the effect that the truck could be seen standing on the highway at distances from 100 to 1,300 feet.

Defendants contend that the overwhelming evidence shows that the accident occurred in less than one hour after sunset and consequently there was no statutory requirement for tail lights and there was no negligence on the part of defendant Marcus in momentarily stopping the truck for the purpose of changing to the reserve tank for his supply of gasoline. As to this contention, we may say that, in our judgment, the verdict finding defendants guilty of negligence is against the manifest weight of the evidence.

Defendants contend that Luhrsen's testimony is the only evidence that bears upon the question as to whether or not the deceased was in the exercise of ordinary care at the time of and just prior to the collision, that his testimony shows that he and his intestate were guilty of gross negligence, and that the trial court should have directed a verdict for defendants upon the ground that the intestate was guilty of contributory negligence. This contention, strenuously argued, is not without some force. While, in our opinion, we would hardly be justified in holding, as a matter of law, that plaintiff's intestate was guilty of negligence that

proximately contributed to the collision, we are satisfied that defendants are justified in contending that the finding of the jury that plaintiff's intestate was in the exercise of ordinary care for his own safety at the time of and just prior to the accident is against the manifest weight of the evidence.

Defendants contend that the argument of plaintiff's counsel was highly inflammatory and prejudicial and deprived defendants of a fair trial. The mother of plaintiff's intestate testified, inter alia, that she had no home and lived everywhere; that she was a widow and plaintiff was her only child; that he handed her every cent he earned; that he would cash his pay check and bring the money home and hand it to her and that he never asked for any money unless "he wanted for his ticket and usually he would have to take that money out of that money and I would give that to him and that would be all and then he would take his lunch and he would buy a pint of milk every day and that would be all." A number of objections were made to this kind of evidence. Some objections were overruled and some were sustained. In his opening argument to the jury counsel for plaintiff stated: "I just want to say that in this case, the evidence shows that this young man, just in the noon-day of life, just starting out, just twenty-one years of age, employed by the Illinois Steel Company, a growing, prosperous concern, earning seventy or eighty dollars a month, bringing that money home to that old mother of his, bringing some happiness into her home in her old age. The record in this case shows that that mother is now approaching fifty-nine years of age, the shadows of life are gradually falling. If that young man had lived another ten years in his family home, he would have brought back to the home of that mother, with the natural love, the same as you or I, or any man upon this jury loves the memory of your mother, if she is dead,

provisionally correct, and to the effect that he was entitled to
 the same as the others in the distribution of the property of the
 estate. That the estate was in the hands of the executor
 and that he was entitled to the same as the others in the
 distribution of the property of the estate.

The estate was in the hands of the executor of the estate.

There was a highly influential and influential and influential
 influence of a fair trial. The matter of the estate was
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handed her every day and the estate was in the hands of the executor
 and the estate was in the hands of the executor and the estate was in the hands of the executor.

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number of objections were made to the kind of the estate, and the estate was in the hands of the executor.

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was again in the hands of the estate, and the estate was in the hands of the executor.

or her presence if she is alive. That young man would have earned ten thousand dollars at thirty-one years of age, let alone the span of life that God intended him to live, I say, men of this jury, unfortunately, under a law, we are only entitled to recover ten thousand dollars in this case, but I say under the evidence and under the law, I ask you men of this jury to bring in a verdict of ten thousand dollars. Whatever your verdict is, you cannot bring back to that mother the cherished memory of that boy.

Mr. Hawkins (counsel for defendants): I object to that as wholly prejudicial and inflammatory and not proper argument to a jury.

The Court: Overruled. (To which said ruling of the court, the defendant, by his counsel then and there duly excepted.) Mr.

Crahen (counsel for plaintiff): I am not trying to inflame anybody.

Mr. Hawkins:

✓ I would like to have a ruling on that line of argument. The Court:

I don't think there is anything in it. Mr. Crahen: All I ask you men of this jury, you came here from every walk of life, every man of you had a mother, think of this mother, just the same as you would think of your own mother." In his closing argument counsel

for plaintiff stated: "Now, gentlemen of the jury, I ask you to return a verdict of guilty in this case. You know what the facts are. You know that this young man left a mother sixty or fifty-nine years of age, the mother who told you from the stand here that she has no home - Mr. Hawkins: I object to that argument. Mr.

Crahen: She has no home? The Court: That is not proper argument.

I sustain that, with reference to the home. Mr. Crahen: I say, gentlemen of the jury, that no matter what your verdict in this case may be, you can't bring back this young man, and it is my humble belief that if he could speak to you he would say that you have not the power to bring me back to my mother, but you have at least -- Mr. Hawkins: I object. Mr. Crahen: -- the power --

Mr. Hawkins: Just a minute, I object. Mr. Crahen: -- to do the

or not procedure if what is alive. That's what you would have wanted
in the case of a child, and you would have wanted the
open of life, and you would have wanted him to live, and you would have
wanted, and you would have wanted, and you would have wanted to recover
and you would have wanted in this case, and you would have wanted
and you would have wanted, and you would have wanted to bring in a verdict
of ten thousand dollars. However your verdict is, you would
bring back to me either the obedient memory of that day.
Mr. Hawkins (counsel for defendant): I object to that as being
prejudicial and inflammatory and not proper evidence in a jury.
The Court: Sustain the objection. (The witness said nothing of the Court, the
defendant, by his counsel then and there only said, "No."
Counsel (counsel for plaintiff): I am not going to inquire any more.
Mr. Hawkins: I would like to have a ruling on that line of argument. The Court:
I don't believe there is anything to it. Mr. Hawkins: All I ask you
out of this jury, you have heard every word of this, every word
of the mother, and of the father, and of the child, and of the
would like of your own witness. In his closing argument, counsel
for plaintiff asked, "Now, gentlemen of the jury, I ask you to
return a verdict of guilt in this case. You know what the facts
are. You know that this young man is a mother's child, and that the
years of age, the mother who said you from the child said that she
has no home - Mr. Hawkins: I object to that argument. Mr.
Counsel: He has no home. The Court: That is not proper argument.
I sustain that, with reference to the name. Mr. Hawkins: I say,
gentlemen of the jury, that no matter what your verdict in this
case may be, you can't bring back this young man, and it is my
humble belief that if he could speak to you he would say that you
have not the power to bring me back to my mother, and you have no
power -- Mr. Hawkins: I object. Mr. Hawkins: -- the power --
Mr. Hawkins: Just a minute, I object. Mr. Hawkins: -- to do this

best you can. Mr. Hawkins: I object to this line of argument as not proper at all. The Court: Sustained. Mr. Crahan: You men know from your own experience what this young man is worth, and as the court I believe will tell you that it is not necessary for us to introduce evidence on that. You men, you know what this young man's life is worth. I say it is worth \$10,000, and not a cent less, and I ask you men of the jury to bring in a verdict for this amount of money. It is my belief that this young man lost his life by reason of the most reckless carelessness on the part of these defendants, and they should respond to the mother of this boy. I thank you, gentlemen." That the argument of counsel for plaintiff was inflammatory and prejudicial to defendants and designed to arouse the sympathies of the jury, can hardly be questioned. The mother was pictured as an old woman, left alone in the world, and without a home. The trial court erred in overruling the objections to portions of it and even though he sustained objections to other parts of it he failed to admonish the jury to disregard the line of argument being pursued. Nor did counsel for plaintiff withdraw any of the statements made. It was, of course, improper for counsel to express his belief as to the merits of the case. Telling the jury what plaintiff's intestate would say to them if he had the power to speak to them was a deliberate attempt to appeal to their sympathies, instead of to their reason. Telling the jury that it was unfortunate that under the law they could award damages in the amount of only \$10,000, and then stating that, in his opinion, the young man's life was worth \$10,000, was also improper and prejudicial argument.

Other contentions are raised by defendant, but in our judgment it is not necessary for us to consider the same.

The judgment of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.
Gridley, P. J., and Sullivan, J., concur.

best you can. Mr. Justice: I object to this line of argument as not proper at all. The Court decided, Mr. Justice, that men know from their own experience that this Court can be misled and as the Court I believe will hold that it is not necessary for me to take the witness on that. You may, you know that this young man's life is worth. I say it is worth \$10,000, and not a cent less, and I ask you men of the jury to bring in a verdict for this amount of money. It is my belief that this young man lost his life by reason of the most careless carelessness on the part of these defendants, and they should respond to the notice of this boy. I thank you, gentlemen. That was argument of counsel for plaintiff was immaterially and prejudicial to defendant and I intend to answer the suggestions of the jury, even hardly be necessary. The other was placed on an old woman, that alone in the jury, not without a name. The trial court ruled in overruling the objection to portions of it and over that I maintained objections to other parts of it as being immaterial. The jury is discharged the case of defendant being returned. The did counsel for plaintiff at that end of the statement made it was, of course, improper but counsel so respond also failed to do the matter of the case. Telling the jury what plaintiff's interests would say to them if he had the power to speak to them was a deliberate attempt to appeal to their sympathies, instead of to their reason. Telling the jury that it was unnecessary, and under the law they could never be found in the amount of only \$10,000, and that at this time, in the opinion, the young man's life was worth \$10,000, was also improper and prejudicial argument.

Other questions were asked by defendant, but in our judgment it is not necessary for us to consider the same.

The judgment of the superior court of Cook County is reversed and the cause is remanded for a new trial.

37502

THOMAS McGREAL, Administrator of
the Estate of FRANCIS PATRICK
McGREAL, Deceased,
Plaintiff in Error,

v.

JOHN TIBERI, doing business as
BRIGHTON PAVING COMPANY,
Defendant in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

278 I.A. 628

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action on the case in which the administrator sues to recover damages for the death of plaintiff's intestate, a minor, which resulted from an accident in which the minor was run over by defendant's truck. A verdict was returned finding defendant not guilty and this writ of error is prosecuted to reverse a judgment entered upon the verdict.

Defendant has filed a motion to strike the bill of exceptions from the transcript of the record. The motion is based upon the contention that the transcript of the record discloses no reason why the bill of exceptions, approved June 17, 1933, was not filed until October 30, 1933. Judgment was entered on April 15, 1933, and on the same day an order was entered by Judge A. W. Summers, who presided at the trial of the cause, which provided, inter alia, that "sixty days time from this date is allowed the plaintiff in which to file his Bill of Exceptions herein." On June 12, 1933, an order was entered in which the time to file the bill of exceptions was "extended thirty days from this date." On June 16 notice was duly served upon attorneys for defendant that on June 17, 1933,

THOMAS HOBBS, Administrator of
the Estate of JAMES HOBBS,
Deceased, Plaintiff in Error,
v.

JOHN F. HILL, Joint Business
Manager of JAMES HOBBS,
Deceased, Defendant in Error.

ORDER TO DISMISS CASE
ON MOTION.

2751 A 238

THE JUDGE OF THE COURT IN HIS ORDER.

An action on the case in which the administrator was to
recover damages for the death of JAMES HOBBS, deceased, a minor,
which resulted from an accident in which the child was run over
by defendant's truck. A verdict was returned finding defendant
not guilty and this writ of error is presented to reverse a
judgment entered upon the verdict.

Defendant has filed a motion to strike the bill of
exceptions from the transcript of the record. The motion is
based upon the contention that the transcript of the record
discloses as correct the bill of exceptions, approved June
17, 1933, and not filed until October 17, 1933. Judgment was
entered on April 18, 1933, and on the same day an order was
entered by the court, "so provided by the bill of
the court, which provided, inter alia, that "sixty days from
from this date is allowed the plaintiff in which to file his
bill of exceptions hereto." On June 14, 1933, an order was
entered in which the time to file the bill of exceptions was
extended thirty days from this date. On June 15, 1933,
defendant moves upon attorney for defendant that on June 15, 1933,

plaintiff would appear before the Honorable A. W. Summers, acting judge of said court, "and present the plaintiff's bill of exceptions in this cause for filing and approval." On June 17, 1933, the bill of exceptions was presented to Judge Summers and it was then, in open court, approved and signed, and the following order was then entered:

"This day comes the plaintiff and presents to the court his Bill of Exceptions herein for approval and said bill of exceptions are duly approved signed sealed and ordered filed."

Upon the page of the bill of exceptions where appears the approval of the judge, appears also the following: "O.K. as to form Miller, G. W. & A. (attorneys for defendant) Chas. A. Nowak and Chas C. Bombaugh Atty. for Ptff." Then follows this stipulation, signed by both parties:

"It is hereby stipulated and agreed by and between the parties to the above entitled cause, that the original Bill of Exceptions may be inserted and used in the transcript of record in said cause in the Appellate and Supreme Courts of Illinois, in lieu of a copy."

On October 30, 1933, upon motion of plaintiff, Judge Caverly entered the following order:

"On motion of Chas. C. Bombaugh, attorney for plaintiff and it appearing to the Court that the Honorable A. W. Summers, the acting Judge before whom this cause was tried has approved the Bill of Exceptions heretofore tendered and presented to him for approval and filing on June 17th, 1933 and it further appearing to the Court that said A. W. Summers is not now holding Court in Cook County, it is therefore hereby ordered that the clerk of this Court file said Bill of Exceptions nunc pro tunc as of June 17th, 1933."

The record fails to show that notice of this last motion was served on defendant's counsel.

Defendant contends that "the purported order of Judge Caverly did not in any way validate the bill of exceptions." It is sufficient to say in answer to this last contention that in disposing of this motion to strike we may ignore the order entered by Judge Caverly. Attorneys who have stipulated in writing upon an original certificate of evidence that it may be incorporated in the transcript

of the record "in lieu of a copy, for the purposes of appeal" are estopped to object that such certificate was not filed with the clerk within the time allowed by the court. (Lederbrand v. Pickrell, 167 Ill. 624; North v. Board of Trustees, Univ. of Ill., 201 Ill. App. 449, 452.) As to the effect of stipulations between parties in regard to bills of exceptions, see Berz v. McCartney, 115 Ill. App. 66; Brethold v. Village of Wilmette, 163 Ill. 162; Madden v. City of Chicago, 283 Ill. 165; Northwest Park Dist. v. Hedenberg, 267 Ill. 588. The motion of defendant to strike the bill of exceptions from the transcript of the record is denied.

Francis Patrick McGreal, a minor of the age of four years and three months, lived with his parents on May street, between 79th and 80th streets in Chicago. May street runs north and south and 79th and 80th streets, east and west. Just north of the home of the child there is an alley that runs east and west on both sides of May street. At the time of the accident the alley on the east side of May street was paved and defendant was then engaged in paving the alley on the west side of the street. On that side was located defendant's concrete mixer, and for a considerable distance north and south of the alley on the east side of May street piles of paving material had been placed. It was the duty of the driver of defendant's truck, which caused the injury, to gather the material from these piles, load it onto his truck, and deliver it to the concrete mixer, which required him to go into the alley on the other side of the street. In doing this work the driver would back his truck to a pile of material, then drive it forward to another pile, then back it into the alley in order to change the direction of the truck, then either drive forward or backward to another pile of material and then move toward the mixer. The accident happened about noon on a bright, clear day, when May street and the alley on both sides of it were free of any traffic or vehicles save the truck in question. The

of the record in lieu of a copy, for the purpose of showing and
is hoped to object that such evidence was not filed with the
clerk within the time allowed by the court. (Lindbergh v. Lindbergh,
187 Ill. 644; Board of Trustees v. Board of Directors, 201 Ill.
430, 432.) As to the effect of stipulations between parties in
regard to filing of evidence, see People v. McCarty, 110 Ill. 39.
68; People v. Village of Alton, 108 Ill. 108; Madison v. City
of Chicago, 203 Ill. 107; Forbes v. Board of Directors, 207
Ill. 283. The motion of defendant to strike the bill of exceptions
from the transcript of the record is denied.

Francis Watson McGraw, a minor of 13 years of age, four years
and three months, lived with his parents on May Street, between Fifth
and Sixth Streets in Chicago. May Street runs north and south and
Fifth and Sixth Streets, east and west. Just north of the home of the
child there is an alley that runs east and west on both sides of
May Street. At the time of the accident the alley on the east side
of May Street was paved and defendant was then engaged in paving the
alley on the west side of the street. On that side was located
defendant's concrete mixer, and for a considerable distance north
and south of the alley on the west side of May Street bills of paving
material had been placed. It was the duty of the driver of defendant's
truck, which was used the night, to gather the material from these
piles, load it onto his truck, and deliver it to the concrete mixer,
which required him to go into the alley on the other side of the
street. In doing this work the driver would back his truck to a pile
of material, then drive it forward to another pile, then back it into
the alley in order to change the direction of the truck, then either
drive forward or backward to another pile of material and then move
toward the mixer. The accident happened about noon on a bright,
last day, when May Street and the alley on both sides of it were
free of any traffic or vehicles save the truck in question. The

truck was not equipped with a rear view mirror, and at the time of the accident the driver, without blowing a horn or sounding any warning, backed the truck, which knocked down the deceased and ran over his head. "The whole length of the truck went over him and then travelled fifteen or twenty feet besides." The boy was in the street at the time he was struck.

The declaration contains three counts. The first charges the defendant with negligently and carelessly driving, controlling, managing, equipping and operating its truck with the result that it ran into and over the minor, causing his death. The second charges a violation of the Motor Vehicle law of the state, viz., that it failed to equip the truck with a mirror so attached to the truck that it would afford the driver a view of the road behind. As bearing upon this last count the driver of the truck, the only witness for defendant, admitted that the tailgate of the truck was so high that he could not see anything back of the truck "for a distance of ten feet backward from the immediate rear end of the truck."

Plaintiff contends and strenuously argues that "the verdict and judgment in this case are against the manifest weight of the evidence and are against the law." After a careful examination of the evidence we have reached the conclusion that the evidence clearly proves the negligence of the driver of the truck; but defendant contends that the evidence shows that the parents did not exercise sufficient care for the safety of the boy and that therefore the verdict of the jury was justified. It is undoubtedly the settled law of this state that if a child is killed the contributory negligence of the parents is a bar to an action by the administrator of the estate of the child under section 1 of the Injuries act.

(Ohnesorge v. Chicago City Ry. Co., 259 Ill. 424.) In West Chicago St. Ry. Co. v. Liderman, 137 Ill. 463, 471, it was said:

Truck was not equipped with a rear view mirror, and at the time of the accident the driver, without blocking a horn or sounding any warning, backed the truck, which knocked down the boy and ran over his head. "The whole length of the truck went over him and then travelled fifteen or twenty feet behind." The boy was in the street at the time he was struck.

The defendant denies this account. The first of these the defendant says is entirely untrue, contending that the truck was equipped with a rear view mirror, and that it was the driver's duty to sound the horn and to block the horn when backing. The second charge is a violation of the Motor Vehicle Law of the State, and that it failed to equip the truck with a mirror as required by the law. The driver of the truck testified that he was backing the truck when he saw the boy, and that he could not see him. This fact about the driver of the truck, the only witness for the defendant, admitted that the defendant of the truck was so high that he could not see anything back of the truck "for a distance of ten feet backward from the immediate rear end of the truck."

Plaintiff contends and affirmatively states that "the verdict and judgment in this case are against the weight of the evidence and are against the law." After a careful examination of the evidence we have reached the conclusion that the evidence clearly proves the negligence of the driver of the truck; but defendant contends that the evidence does not show that the defendant was negligent as to the fact of the boy and that therefore the verdict of the jury was justified. It is undisputed by the parties that the fact that it is killed the compulsory negligence of the defendant is a bar to an action by the representative of the estate of the child under section 1 of the Infants Act.

Whitcomb v. Whitcomb, 137 Ill. App. 2d 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

"It is undoubtedly the duty of parents in cities to use reasonable care to guard their children against the known danger to them when allowed to go unattended upon the public streets; but the standard of such care is not capable of being defined by the law, and each case must depend upon its own facts and circumstances. That it is not negligence per se to permit infants to be upon the streets of a city was held by this court in City of Chicago v. Major, 18 Ill. 349."

In that case the court quotes, with approval, from Fox v. Oakland Consolidated Street Railway Co., 118 Cal. 55, the following:

"To the contention on behalf of defendant below that the evidence established negligence per se, the court say: 'If the term "negligence" signified an absolute quantity or thing, to be measured in all cases in accordance with some precise standard, much of the difficulty which besets courts in the solution of this class of cases would be at once dissipated. But, unfortunately, it does not. Negligence is not absolute, but is a thing which is always relative to the particular circumstances of which it is sought to be predicated. For this reason it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a very general rule it is a question of fact for the jury - an inference to be deduced from the circumstances; and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. The fact that the evidence may be without conflict is not controlling, nor even necessarily material. Conceded facts may as readily afford a difference of opinion as to the inferences and conclusions to be drawn therefrom as those which rest upon conflicting evidence, and if there be room for such difference the question must be left to the jury. (Beach on Contributory Neg. sec. 163; Schierhold v. North Beach Railroad Co., 40 Cal. 447; Van Praag v. Gale, 107 Cal. 438.) Within these principles the evidence of this case cannot be said to establish negligence per se. Parents are chargeable with the exercise of ordinary care in the protection of their minor children, and whether the conduct of the mother, for which plaintiff is to be held responsible, in permitting the deceased child to be out of her sight for a period of from fifteen to twenty minutes without satisfying herself of its whereabouts, was, under all the circumstances, a want of ordinary care, was, we think, a fairly debatable question.' Schierhold v. North Beach Railroad Co., *supra*, Weeks v. Southern Pacific Railroad Co., 56 Cal. 513, Birkett v. Kniekerbocker Ice Co., 110 N. Y. 504, Slattery v. O'Connell, 153 Mass. 94, and Creed v. Kendall, 156 id. 291, are to the same effect."

In the opinion in the Liderman case appears also the following:

"When facts are unchallenged, and are such that reasonable minds could draw no other inference or conclusion from them than that the plaintiff was or was not at fault, then it is the province of the court to determine the question of contributory negligence as one of law, and when the case is all against the plaintiff there may properly be a non-suit; but in the language of Mr. Field,

[illegible]

In fact, the only person who was not a member of the group was the one who was not a member of the group.

Continued on next page

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1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the proposed changes to the law.

properly be a constant; but in the language of Mr. Field, "then and there it all remains the plaintiff's mere may or may not." The plaintiff's negligence as one of law, and then it is the province of the court to determine the fact that the plaintiff was or was not at fault, responsible and liable for no other inference or conclusion than that he was negligent, and the court find

"to justify a non-suit on the ground of contributory negligence the evidence against the plaintiff should be so clear as to leave no room for doubt, and all material facts must be conceded or established beyond controversy." Beach on Contributory Neg. secs. 447, 448, 449; Chicago and Eastern Illinois Railroad Co. v. O'Connor, 119 Ill. 586; Roehn v. Chicago, Peoria and St. Louis Railway Co., 152 id. 223; Wabash Railway Co. v. Brown, id. 484; Chicago and Western Indiana Railroad Co. v. Ptacek, 171 id. 9."

In the instant case the only evidence as to the parents' care or want of care and caution for the safety of the child was given by witnesses for plaintiff, who were members of the family of the deceased. Defendant offered no evidence bearing on the question. The mother of the deceased testified that he was four years and three months old and had enjoyed perfect health all of his life; that just before the accident she saw him playing with boxes in their back yard; that he had found the boxes in the basement and she saw him piling them one on top of the other; that she was standing on the back porch just before the accident and saw the deceased walk into the basement; that it was about twelve o'clock noon and she started to set lunch; that she went out to the porch to see where the deceased was and at that moment her son Joseph called to her and said that the deceased was hurt; that not more than ten minutes elapsed between the time that she saw the deceased go into the basement and the accident; that Joseph was home, in the living room in the front of the house; that he had been quarantined because he had diphtheria. Thomas McGreal, the father of the deceased, testified that he was a lieutenant in the fire department of the city of Chicago and was at work at the time of the accident; that Joseph, nine years of age, was the eldest of six children.

At the instance of defendant the court gave to the jury the following instructions:

"You are instructed that if you believe from the evidence that the parents of the deceased were negligent in failing to prevent the deceased from being in the street, and that without such failure on their part the accident in question would not

have happened, then you must find the defendant not guilty." Plaintiff, after directing our attention to the fact that defendant offered no proof tending to show any negligence on the part of the parents in the care of the child, contends that there was no evidence in the case to warrant the giving of the instruction. That there may be cases where the facts are such that the giving of an instruction bearing upon the negligence of the parents would not be warranted, see Belcher v. John M. Smyth Co., 243 Ill. App. 65, wherein the court was of the opinion that the giving of such an instruction was unwarranted because, under the facts of that case, there was no evidence tending to show any negligence on the part of the parents in the care of the child; but as stated in West Chicago St. Ry. Co. v. Liderman, *supra*, p. 472:

"As a very general rule it is a question of fact for the jury - an inference to be deduced from the circumstances; and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. The fact that the evidence may be without conflict is not controlling, nor even necessarily material. Conceded facts may as readily afford a difference of opinion as to the inferences and conclusions to be drawn therefrom as those which rest upon conflicting evidence, and if there be room for such difference the question must be left to the jury."

In the instant case we do not think that we would be justified in holding, under all the circumstances, that the alleged want of ordinary care was not a question for the jury to determine. We are satisfied, however, that if the jury had found that the parents had used reasonable care to guard the deceased, we would not have been justified in disturbing that finding. Plaintiff strenuously contends that the instruction in question is so worded that "the jury might quickly infer that any failure of the parents to keep the child off the street would be the negligence referred to in the instruction and that a mere failure of the parents to keep the child off the street at the time of the accident constituted inexcusable negligence upon their part;" that the instruction "could well mislead the jury to the

belief that it became and was the fixed duty of the parents of the deceased, then but little over four years of age, to keep the child off the public streets, at all times and under all circumstances, and that mere failure to do so constituted not only contributory negligence but actual negligence upon their part." We are of the opinion that the instruction was highly misleading and subject to the criticism made by plaintiff. There is nothing in the instruction that informs the jury that it is not negligence per se for parents to permit infants to be alone upon the streets of a city, and that parents, in cities, are required to use only reasonable care to guard their children against the known danger to them when allowed to go unattended upon the public streets. The further contention of plaintiff that, under all the facts and circumstances in evidence, the verdict of the jury must have resulted from the giving of this instruction seems to us a meritorious one.

Finding, as we do, that the giving of this instruction constitutes reversible error, the judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

REVISED AND REMANDED.

Gridley, P. J., and Sullivan, J., concur.

believe that it is not only the duty of the government to the people, but also the duty of the people to the government, to keep the public informed of all that is going on in the government, and that this is not only the duty of the government, but also the duty of the people. The public has a right to know what the government is doing, and the government has a duty to tell the public what it is doing. This is the principle of the open government, and it is the principle that should govern the conduct of the government in all its dealings with the people. The public has a right to know what the government is doing, and the government has a duty to tell the public what it is doing. This is the principle of the open government, and it is the principle that should govern the conduct of the government in all its dealings with the people.

Finally, it is the duty of the government to keep the public informed of all that is going on in the government, and the public has a duty to keep the government informed of all that is going on in the public. This is the principle of the open government, and it is the principle that should govern the conduct of the government in all its dealings with the people.

THE PUBLIC HAS A RIGHT TO KNOW

WHY THE GOVERNMENT IS DOING IT

37512

N. W. CONBARDY, as successor
trustee,

Appellee,

v.

GEORGE L. GLENDON,

Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

278 I.A. 629¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On September 25, 1933, plaintiff obtained a judgment by confession in favor of plaintiff and against defendant for \$1,028.50, which included \$122.50 for attorney's fees. The judgment was obtained under a trust agreement whereby Phillip State Bank and Trust Company, Trustee, agreed to sell certain real estate to defendant, and defendant agreed to purchase the same. On December 5, 1933, defendant filed his verified petition praying that the judgment be vacated and set aside. On January 12, 1934, plaintiff filed certain written objections "to the sufficiency of petition of defendant to open up judgment in the above entitled cause and grant leave to plead." On January 17, 1934, defendant, by leave of court, filed his amended petition to vacate the judgment by confession. The verified amended petition is as follows:

"Your petitioner, George L. Glendon, respectfully represents to the Court that he is the defendant in the above cause and on the 27th day of September, 1933, a judgment was entered in said cause against him by confession under a power of attorney contained in a certain contract for Warranty Deed for the sum of One Thousand Twenty eight and 50/100 Dollars (\$1,028.50), and costs of suit. That no execution on said judgment has been served on your petitioner and the first knowledge he received of the same was when he was told that a judgment appeared against him and thereupon he requested his attorneys to search the records to ascertain if there was

37812

W. J. COMBES, Jr., executor,
Trustee,

Appellee,

v.

GEORGE L. HENSON,
Appellant.

STATE OF MISSISSIPPI

COUNTY OF CHICO.

278 I.A. 629

MR. JUSTICE GEORGE L. HENSON, THE CLERK OF THE COURT.

On September 28, 1933, plaintiff obtained a judgment by confession in favor of plaintiff and against defendant for \$1,000.00, which included \$25.00 for attorney's fees. The judgment was obtained under a trust agreement whereby William State Bank and Trust Company, Trustee, agreed to sell certain real estate to defendant, and defendant agreed to purchase the same. On December 2, 1933, defendant filed his verified petition praying that the judgment be vacated and set aside. On January 12, 1934, plaintiff filed certain written objections "to the sufficiency of petition of defendant to open up judgment in the above entitled cause and grant leave to plead." On January 17, 1934, defendant, by leave of court, filed his amended petition vacating the judgment by confession. The verified amended petition is as follows:

"Your petitioner, George L. Henson, respectfully represents to the Court that he is the defendant in the above cause and on the 28th day of September, 1933, a judgment was entered in said cause against him by confession under a power of attorney contained in a certain contract for money loaned for the sum of One Thousand Twenty eight and 80/100 Dollars (\$1,028.80), and costs of suit. That no execution on said judgment has been served on your petitioner and the first knowledge he received of the same was when he was told that a judgment appeared against him and thereupon he requested his attorney to search the records to ascertain if there was

a judgment against him and he was informed of the above judgment and he at once makes his application to have the same vacated.

"Your petitioner further represents that in the month of January, 1929, a certain real estate salesman by the name of T. Raffington represented to your petitioner that he was the authorized salesman for the owners of certain lots located in the Village of Evanston and solicited him to buy one of said lots and represented to him that the same was located on Main Street in said Village of Evanston and because of its location was of great value and a good investment for the price it was offered for sale and thereupon went with your petitioner to inspect said lot and pointed out said lot located, as he stated on said Main Street, and by reason of its favorable location your petitioner agreed to purchase the same. That said salesman thereupon presented him with a contract for Warranty Deed for said lot, which your petitioner signed and is the contract upon which judgment is entered herein and upon which your petitioner made the preliminary payment as required and thereafter made the monthly payments thereon to the Phillip State Bank who held title to said real estate as trustee and accepted and ratified said contract and the acts and representations of its said agent T. Raffington, until sometime prior to the month of October, 1932, when one S. H. Kleinman advised your petitioner that he was one of the owners of the property set forth in said contract and pointed out to your petitioner that the lot described in said contract was not located upon Main Street as represented, but was located on Greenleaf Street in a section that rendered said lot of very little value. Your petitioner further represents that he thereupon investigated the location of said lot and verified the fact that said lot was not located on said Main Street at said location as pointed out to him by the said T. Raffington, but was located on said Greenleaf Street and because of said location was not desirable as an investment and was not worth the balance due under said contract and because of said fraud and misrepresentation he refused to make further payments and demanded the return of the payments by him made.

"Your petitioner further represents that said S. H. Kleinman thereupon stated that said property had been sold through the Burton Haskell Real Estate Improvement Company, of which he was an officer, and said company had the exclusive selling agency for said real estate and the said T. Raffington who negotiated said sale was a salesman or sub-agent for said Burton Haskell Real Estate Improvement Co. That said Burton Haskell Real Estate Improvement Company had authority to make contracts for the sale of lots held in trust by the Phillip State Bank of Chicago as trustee, of which the aforesaid lot was one and had authority to cancel contracts wherein errors had been made and because of the error or misrepresentation made by the said T. Raffington it would cancel said contract and give your petitioner full credit for all payments made upon a new contract for a lot located in a section of Evanston, known to your petitioner and regarded by him as being a good investment.

"Your petitioner further represents that thereupon said S. H. Kleinman procured a contract by Warranty Deed with one John Morelock as the owner of said lot dated October 8, 1932, wherein your petitioner was given credit on account of the purchase price of the same, the sum of Two Thousand Eight Hundred Fifty Dollars (\$2,850.00) being the payment made on said contract upon which judgment has been entered herein and also took from your petitioner a quit claim deed to said lot fourteen (14) in Block two (2) in Grey's Main Street Addition to Evanston. That said S. H. Kleinman

a judgment against him and he was informed of the above facts.
and he was made the application to have the same voided.
Your petitioner further represents that in the month of
January, 1932, a certain real estate salesman by the name of
T. Hallington requested to your petitioner for the name of
an individual known to the owner of certain lots located in
the Village of Evanston and solicited him to buy one of said lots
and represented to him that the same was located on Main Street
in said Village of Evanston and because of the location and of
great value and a good investment for the price it was offered
for and that your petitioner was with your petitioner to inspect said
lot and pointed out said lot located, as he stated on said Main
Street, and by reason of his false representation your petitioner
agreed to purchase the same. That said salesman thereupon
presented him with a contract for said Main Street lot, which
contract was signed and is the contract upon which
judgment is entered herein and upon which your petitioner was
the preliminary payment as required and thereupon made the
monthly payments thereon to the Illinois State Bank who paid
the same to said lot but he was not and according to the contract
said contract and the sale and representation of it to the owner
T. Hallington, until sometime prior to the month of October, 1932,
when one S. H. Klinebaum advised your petitioner that he was one
of the owners of the property and that in said contract and
pointed out to your petitioner that the lot described in said
contract was not located upon Main Street as represented, but
was located on Greenleaf Street in a section that was not a
lot of very little value. Your petitioner further represents
that he thereupon investigated the location of said lot and verified
the fact that said lot was not located on said Main Street as said
location as pointed out to him by the said T. Hallington, but was
located on said Greenleaf Street and because of said location was
not desirable as an investment and was not worth the balance due
under said contract and because of said fraud and misrepresentation
he refused to make further payments and demanded the return of the
payments by him made.
Your petitioner further represents that said S. H. Klinebaum
Klinebaum thereupon stated that said property had been sold through
the Burton Real Estate Improvement Company, of which he
was an officer, and said company had the exclusive selling agency
for said real estate and the said T. Hallington who represented
said lot as a salesman or sub-agent for said Burton Real Estate
Improvement Co. That said Burton Real Estate Improvement
Company had authority to make contracts for the sale
of lots sold in trust by the Illinois State Bank of Chicago as
trustee, of which the said lot was one and had authority to
execute contracts wherein there had been made no provision of the
return or money consideration made by the said T. Hallington in said
contract and that your petitioner fully believed for all
payments made upon a new contract for a lot located in a section
of Evanston, known to your petitioner and regarded by him as
being a good investment.
Your petitioner further represents that thereupon said
S. H. Klinebaum procured a contract by certain date with one John
Mortlach as the owner of said lot dated October 8, 1932, wherein
your petitioner was given credit on account of the purchase price
of the same, the sum of Two Thousand Eight Hundred Fifty Dollars
(\$2,850.00) being the payment made on the contract upon which
judgment has been entered herein and also cash from your petitioner
a claim made to said lot fourteen (14) in Block two (2) in
Block 14, Street addition to Evanston. That said S. H. Klinebaum

also stated that said contract upon which plaintiff has entered judgment had been cancelled and your petitioner was relieved of any further liability thereon, and your petitioner represents that since said time he has been making payments upon his said contract with John Morelock.

"Your petitioner further represents that the Phillip State Bank as Trustee, held title to said real estate set forth in said contract upon which judgment has been entered herein under its trust number 433 and the beneficial owners of said real estate were Thomas E. Grey and Burton Haskell Real Estate Improvement Company. That the capital stock of said Burton Haskell Real Estate Improvement Company was owned and controlled by Eli Kleinman and the said S. H. Kleinman, and the said S. H. Kleinman was an officer of said Burton Haskell Real Estate Improvement Company and it also had, by agreement of the parties the exclusive selling agency for said trust property and it was by and through the same that the said T. Raffington procured said contract from your petitioner.

"Your petitioner further represents that the said Phillip State Bank and beneficial owners of said property had knowledge of said false and fraudulent representation imposed upon him and by their agent and salesman, T. Raffington and by accepting said contract and receiving the benefits thereunder ratified the same and the acts and representations of said agent, and by reason of said deceit false and fraudulent acts and representations said contract is void and your petitioner has repudiated said contract and that the said Burton Haskell Real Estate Improvement Company as one of the beneficial owners had authority to and did cancel said contract and took from your petitioner a quit claim deed wherein your petitioner conveyed and quit claimed his interest in and to said real estate.

"And your petitioner alleges that the said Thomas E. Grey, who was one of said beneficial owners and for whose benefit said judgment herein was entered signed the affidavit of plaintiff's claim herein and has knowledge of the facts herein set forth and regardless of said false and fraudulent practice of his said agent has ratified the same and accepted the benefits under said contract, and by reason of the fraud and imposition practiced upon your petitioner said contract is void and has been duly cancelled by the said S. H. Kleinman; that your petitioner is not indebted to the said plaintiff herein; that said judgment was entered without any law or authority for the same; and

"Your petitioner therefore prays that said judgment be vacated and set aside and your petitioner will ever pray."

Plaintiff filed no objections to the sufficiency of the amended petition. Nor was any motion filed or made by plaintiff the effect of which would test the sufficiency of the amended petition. The "report of proceedings" states that the cause came on for hearing upon the motion of defendant on his amended petition to vacate the judgment and that defendant, to maintain the issues on his part, presented to the court the amended petition to vacate the judgment by confession, which was all the evidence heard; that "the court denied the motion of defendant and petitioner," and thereupon

entered the following order:

"Hearing on amended petition.

"This cause coming on for hearing upon the motion of the defendant heretofore entered herein to vacate judgment by confession of September 25th, 1933, and the Court being fully advised in the premises overrules said motion."

It is from this order that defendant has appealed. From the "report of proceedings" it appears that plaintiff made no motion of any kind in reference to the amended petition.

In this court plaintiff has filed a motion that the appeal be dismissed on the ground that "notice of appeal was not served on plaintiff when and as provided for in Rule 33 of the Supreme Court Rules." We find no merit in the motion and it will be denied. What was said by the court in Schornick v. Prudential Ins. Co., 277 Ill. App. 36, 38-9, applies with equal force to the instant motion.

After a careful examination of the verified amended petition we are of the opinion that sufficient facts are properly alleged to make out a prima facie defense to the claim of plaintiff. We have considered the able but highly technical argument of counsel for plaintiff in support of the trial court's action, but we are satisfied that defendant is entitled, by reason of his amended petition, to his day in court.

The judgment order of the Municipal court of Chicago, appealed from, is reversed, and the cause is remanded with directions to the trial court to allow defendant's amended petition to stand as an affidavit of merits, the judgment to stand as security.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Sullivan, J., concur.

entered the following order:

"Having on amended petition.

"This order coming on for hearing upon the motion of the defendant to set aside the judgment rendered by the court in the case of James v. [illegible], do hereby order that the said judgment be set aside and the case be remanded to the court for further proceedings."

It is from this order that defendant has appealed. From the "report of proceedings" it appears that plaintiff made no motion of any kind in reference to the amended petition.

In this case plaintiff has filed a motion that the

appeal be dismissed on the ground that "notice of appeal was not

served on plaintiff when and as provided for in Rule 33 of the

"Uniform Court Rules." It is found that the motion and its

was denied. That was said by the court in James v. [illegible]

100 No. 277 Ill. App. 2d 37-8, wherein it was held that the

instant motion.

After a careful examination of the verified amended

petition we are of the opinion that the facts are properly

alleged to make out a prima facie case to the claim of plaintiff.

We have considered the whole but highly technical arguments of counsel

for plaintiff in support of the trial court's action, but we are

satisfied that defendant is entitled, by reason of his amended

petition, to his day in court.

The judgment of the trial court is hereby

appealed from is reversed, and the cause is remanded with directions

to the trial court to allow defendant's amended petition to stand as

an affidavit of merits, the judgment to stand as acquittal.

IT IS SO ORDERED.

Witness my hand and seal of office, this 1st day of [illegible]

37525

CITY OF EVANSTON,
Defendant in Error,

v.

JOHN GATEWOOD,
Plaintiff in Error.

437
ERROR TO MUNICIPAL COURT

OF EVANSTON.

278 I.A. 629²

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

John Gatewood, plaintiff in error, hereinafter called defendant, was charged, in a complaint, with having in his possession, on September 1, 1933, in the city of Evanston, certain policy tickets, tabs and notebooks, in violation of section 1559, Evanston Municipal Code of 1927, as amended. A like charge was made at the same time against one James Terry, one Clarence Waller, one Eugene Schileford and one William Anderson. It appears from the "transcript of the evidence" that when the five cases were called for trial defendant Gatewood pleaded guilty to the charge made against him, and that each of the other defendants pleaded guilty to the charge made against him. The transcript further shows the following:

"APPEARANCE FOR THE DEFENDANT John Gatewood, pro se.
* * *

"And thereupon the City of Evanston, to maintain the issues on its behalf, introduced the following evidence, to-wit: Hubert Kelch, having been first duly sworn, was examined and testified for the City of Evanston as follows: My name is Hubert Kelch and I am a police officer of the City of Evanston. On September 1, 1933, I in company with officer Lovelle, stopped John Gatewood in his Lincoln car, driving West on Emerson Street at McCormick Boulevard, in the City of Evanston Cook County, Illinois. I told him we had a search warrant for his car and person which was read to him and he would have to accompany me back to the Evanston Police Station in Evanston. I got in the rear seat of the Lincoln car and told Gatewood to drive to the police station in Evanston. At the police station in Evanston, we searched Gatewood and the men in the car with him who had been placed under arrest for gambling devices and gambling paraphernalia.

[illegible]

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RECEIVED AT THE OFFICE OF THE SECRETARY OF DEFENSE
JAN 10 1967

020 A.1 C72

[Faint, illegible text]

side of the road, and the car was found to be a 1964 Ford Mustang.

possession, on April 1, 1937, in the city of "Venezuela".

certain policy decisions, take and implement, in violation of

1. 1981 to 1985 in the city of San Francisco and San Jose in the state of California and the state of Washington and the state of Oregon and the state of Idaho and the state of Montana and the state of Wyoming and the state of Utah and the state of Arizona and the state of New Mexico and the state of Colorado and the state of Nebraska and the state of Kansas and the state of Oklahoma and the state of Arkansas and the state of Mississippi and the state of Alabama and the state of Georgia and the state of Florida and the state of South Carolina and the state of North Carolina and the state of Tennessee and the state of Kentucky and the state of West Virginia and the state of Ohio and the state of Michigan and the state of Indiana and the state of Pennsylvania and the state of Delaware and the state of Maryland and the state of District of Columbia and the state of Virginia and the state of North Carolina and the state of Tennessee and the state of Kentucky and the state of West Virginia and the state of Ohio and the state of Michigan and the state of Indiana and the state of Pennsylvania and the state of Delaware and the state of Maryland and the state of District of Columbia and the state of Virginia and the state of North Carolina and the state of Tennessee and the state of Kentucky and the state of West Virginia and the state of Ohio and the state of Michigan and the state of Indiana and the state of Pennsylvania and the state of Delaware and the state of Maryland and the state of District of Columbia and the state of Virginia and the state of North Carolina and the state of Tennessee and the state of Kentucky and the state of West Virginia and the state of Ohio and the state of Michigan and the state of Indiana and the state of Pennsylvania and the state of Delaware and the state of Maryland and the state of District of Columbia and the state of Virginia and the state of North Carolina and the state of Tennessee and the state of Kentucky and the state of West Virginia and the state of Ohio and the state of Michigan and the state of Indiana and the state of Pennsylvania and the state of Delaware and the state of Maryland and the state of District of Columbia and the state of Virginia and the state of North Carolina and the state of Tennessee and the state of Kentucky and the state of West Virginia and the state of Ohio and the state of Michigan and the state of Indiana and the state of Pennsylvania and the state of Delaware and the state of Maryland and the state of District of Columbia and the state of Virginia and the state of North Carolina and the state of Tennessee and the state of Kentucky and the state of West Virginia and the state of Ohio and the state of Michigan and the state of Indiana and the state of Pennsylvania and the state of Delaware and the state of Maryland and the state of District of Columbia and the state of Virginia and the state of North Carolina and the state of Tennessee and the state of Kentucky and the state of West</

Like other people who have been at the same time as me, I am quite certain one day.

one lateral one . . . , and one very small one

"negative" to "positive" and not "negative" to "positive"

that when the five cases were called for trial, the witness

To date, there has been no damage shown as a result of your behavior.

The other 3 Yards are placed along with the other 3 Yards as follows:

him. The exact date of his death is not known.

[illegible]

"and therefore the title of 'version' so remains the same as it before, introduced the following evidence, so-called."

It is noted that the above information was furnished to the FBI on 10/10/68.

On the 1st of May, 1941, I was contacted by an officer, who stated that he was a member of the "F.Y. of the Nation".

John G. Galt, Jr., is a resident of the City of New York, New York, and is the owner and operator of the Galt Hotel, located at 1234 Broadway, New York, New York.

Reason which I told him we had a second source for him and

back to the version of the Lincoln and told Gates to drive to the

we searched it out and he got in the car with him and

police station in van ton, & the police station in van ton,

placed under various for sampling devices and containing prearranged

We found nothing on Gatewood's person, but found policy tickets under rear seat of the Lincoln Auto, which was owned and driven by Gatewood. Gatewood and Anderson were riding in the front seat and Terry and Waller and Schillerford were riding in the rear seat. The Court: What have you to say Terry? Defendant James Terry: I had a Policy book on me. The Court: What did you have on you, Waller? The Defendant Clarence Waller: I had a Policy book on me. The Court: What did you have on you, Anderson. The Defendant William Anderson: I had gambling paraphernalia on me. The Court: What did you have on you, Gatewood? The Defendant Gatewood: I had nothing on me. The Court: What did you have on you, Schillerford? The Defendant Eugene Schilleford: I had nothing on me but a piece of plain white paper, a pad of paper with nothing on it. The Court: What did you find on these men, Officer? Officer Hubert Kelch: I found a Policy book, which is used for Gambling purposes on the defendant, Clarence Waller and \$16.00 in a canvas cloth bag; I found a book on James Terry; I found this (showing to court a pad made of white paper without anything on it) on defendant Eugene Schilleford; I found nothing on Gatewood; Found a Policy book on Anderson. The Court: There will be a finding of guilty for all the defendants. Will fine the defendant Terry, One hundred dollars and costs; Will fine the defendant Waller, One hundred dollars and costs; Will fine the defendant William Anderson Two hundred dollars and costs; Will fine the defendant, Gatewood, One Hundred dollars and costs; Will fine the defendant Schilleford, one hundred dollars and costs; Which was all the evidence heard and the proceedings had on the trial of this said cause. This all happened in the city of Evanston, Cook County, Illinois."

The court thereupon entered judgment finding defendant, "on his confession," guilty as charged in the complaint and assessed a fine against him in the sum of \$100. Defendant sues out this writ of error.

The judgment against defendant was entered on September 2, 1933. It appears from the record that defendant had no lawyer to represent him at the hearing. But later in the day, defendant, by his counsel, moved the court to vacate and set aside the judgment against him and the counsel asked the court for permission to offer testimony in support of the motion, which request was granted. Thereupon defendant testified as follows:

"My name is John Gatewood, and I am one of the defendants in this case. On September the 1st, of this year, I was arrested in Niles Center, while I was sitting in my car. I was asked to get out of my car which I did. My car was standing on McCormick Drive, adjacent to Emerson Street, in the Village of Niles Center and was not in the City of Evanston, Illinois; The officer asked me if my name was John Gatewood and I said it was. The police officer then read a search warrant to me and placed me under arrest. I was there searched and my car was there

searched. I had nothing on my person. The officers took some policy tickets from the back of the car, but I did not know they were there. The next morning in court at Evanston, I pleaded guilty; I did not have a lawyer in court. The Judge did not warn me of the consequences before I pleaded guilty; nor did he tell me the fine that might be imposed upon me, nor did he state to me that I could be imprisoned for non-payment of fine. I was not warned after I pleaded guilty and my plea was entered of record, of the effects and consequences of my plea of guilty."

Defendant then called to the stand one Leo Hentz, who testified as follows:

"My name is Leo Hentz; I live at 3042 Church street near McCormick Road in Niles Center. I am a teaming contractor, and have been a member of the park board. I have a map showing the city limits of the City of Evanston and of the village of Niles Center in my hands here. All property west of the canal at this point and adjoining McCormick Road on the east is in Niles Center. From my own knowledge as a resident of the village of Niles Center and from the map I now hold in my hands I can say that Emerson street at McCormick Boulevard is located in the village of Niles Center, Illinois."

Counsel for defendant then stated to the court that the evidence showed that the offense occurred "without the territorial limits of the City of Evanston and in the limits of the village of Niles Center. * * * This court was entirely without jurisdiction of this alleged offense. The search warrant in this case had no validity in the village of Niles Center. A mere plea of guilty did not give this court jurisdiction." The trial court denied the motion to vacate, stating that he was "taking judicial notice that the territory within which the arrest was made is within the corporate limits of Evanston, Illinois."

The only point made and argued in this court is that "the venue of this alleged offense being in the Village of Niles Center, and not within the corporate limits of the City of Evanston, the writs of the Municipal Court of Evanston did not run in the Village of Niles Center, and the Municipal Court of Evanston was without jurisdiction to receive or enter a plea of guilty in this case, and the finding, judgment and sentence of the Municipal Court of Evanston in this cause was a nullity." From an official map of the city of Evanston we find that the intersection of

Emerson street and McCormick road is located in Niles Center, and that all of the land west of the Sanitary District canal at that point is located in Niles Center. The boundary line between Niles Center and the city of Evanston at Emerson street is located east of the canal. Defendant testified that his car "was standing on McCormick Drive, adjacent to Emmerson Street, in the Village of Niles Center and was not in the City of Evanston, Illinois." Officer Kelch testified that he "stopped John Gatewood in his Lincoln car, driving West on Emmerson Street at McCormick Boulevard." The intersection of McCormick road and Emerson street is some little distance from the boundary line between Niles Center and the city of Evanston, and the officer's evidence fails to show that he saw defendant driving the car east of the boundary line. There is, therefore, nothing in the record to prove that defendant drove the automobile from the city of Evanston into Niles Center.

The contention of defendant must be sustained and the judgment of the Municipal court of Evanston is reversed, and, as the City of Evanston may see fit to offer additional evidence, upon a new trial, the cause is remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Sullivan, J., concur.

McGormick street and McGormick road is located in Illinois Center, and that all of the land west of the boundary line is owned by the McGormick family. The boundary line as first point is located in Illinois Center. The boundary line between Illinois Center and the city of Vanaton is located at McGormick street is located east of the center. Defendant testified that his car "was standing on McGormick drive, adjacent to McGormick street, in the Village of Illinois Center and was not in the City of Vanaton, Illinois." Officer Ralph testified that he stopped John G. G. in his Illinois car, driving west on McGormick street at McGormick Boulevard." The intersection of McGormick road and McGormick street is some little distance from the boundary line between Illinois Center and the city of Vanaton, and the officer's evidence fails to show that he was defendant driving the car east of the boundary line. There is, therefore, nothing in the record to prove that defendant drove the automobile from the city of Vanaton into Illinois Center.

The contention of defendant must be sustained and the judgment of the Municipal court of Vanaton is reversed, and, as the City of Vanaton may see fit to offer additional evidence, upon a new trial, the cause is remanded.

REVEREND AND HONORABLE

Edw. J. J. and William J. J. J.

37553

KENNETH JOHNSON, a Minor, by
Victor Johnson, his Father and
Next Friend,

Appellee,

v.

CITY OF CHICAGO, a Municipal
Corporation,

Appellant.

447
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

260 I.A. 629³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action on the case brought by Kenneth Johnson, a minor, by Victor Johnson, his father and next friend, against the City of Chicago, a municipal corporation. A jury returned a verdict in favor of plaintiff for \$1,250, and defendant has appealed from a judgment entered upon the verdict. Plaintiff has not seen fit to file an appearance nor a brief in this court.

Plaintiff's amended declaration consists of one count. It alleges, in substance, that on December 22, 1930, defendant was a municipal corporation and was then in possession of a certain park and playground within its corporate limits, called Winnemac park; that the said park was bounded by the following streets: Damen and Winnemac avenues and Argyle and Leavitt streets; that defendant, by and through its agents and servants, maintained within said park numerous devices for the amusement of the general public, particularly children, one of which devices was a structure a number of feet long and several feet high, commonly known as a slide, at the top of which was a small platform which children reached by ascending a small ladder; that surrounding the platform was a rail, made of wood, a few inches in height;

that on the date aforesaid "and for a long time prior thereto, the defendant, by and through its said agents and servants, so carelessly and negligently maintained the said slide that a large part of said rail was broken away and so remained for a long space of time prior to and including the day and date aforesaid, that plaintiff was then and there a child of eight and one-half years of age and was then and there at all times in the exercise of due care and caution for his own safety; that by reason of the carelessness and negligence as aforesaid plaintiff was then and there caused to and did fall from the platform aforesaid to and upon the ground beneath, and by reason of the premises was then and there rendered unconscious and his body was greatly bruised and lacerated and divers bones of his body were then and there broken * * *; that he has sustained damages in the sum of \$15,000 and therefore brings this suit."

The evidence shows, inter alia, that the city of Chicago maintained within the said park, for the public benefit, the toboggan slide in question, three baseball grounds, a football field in the autumn, and a hockey ring during the winter season; that on the day of the accident, December 22, 1930, plaintiff, with a boy chum and a girl, went to the park with their sleds; that they slid down the toboggan slide several times and plaintiff then went upon the platform to slide down again and found the platform crowded by children. Plaintiff testified, upon direct examination: "I had my sled with me. I remember being on top of the slide, that is all I remember. The next thing I remember I was in the hospital, that is the only thing I remember from the time I was on top of the slide and then in the hospital." Upon cross-examination he testified: "They were pushing too, they wanted to get there first. There were several boys and girls on the top of the platform and they were waiting to use the slide. I think this girl was with me too. I don't

that on the 12th of March, 1930, for a few days prior thereto, the defendant, by and through the said wife and herself, so cruelly and maliciously assaulted the said child that a large part of said child was broken and so remained for a long space of time prior to and including the day and date aforesaid, that plaintiff was then and there a child of eight and one-half years of age and was then and there at all times in the custody of one care and attention for his own safety; that by reason of the carelessness and negligence of defendant plaintiff was then and there caused to and did fall from the platform aforesaid to and upon the ground below, and by reason of the injuries then and there rendered unconscious and his body was grossly bruised and lacerated and diverse bones of his body were then and there broken; that he has sustained damages in the sum of \$10,000 and therefore brings this suit.

The evidence shows, inter alia, that the city of Chicago maintained within the said park, for the public benefit, the toboggan slide in question, three baseball grounds, a football field in the autumn, and a hockey rink during the winter season; that on the day of the accident, December 22, 1930, plaintiff, with a boy whom and a girl, went to the park with their slides; that they slid to the toboggan slide several times and plaintiff then went upon the platform to slide down again and found the platform crowded by children. Plaintiff testified, upon direct examination: "I had my slide with me. I remember being on top of the slide, that is all I remember. The next thing I remember I was in the hospital, that is the only thing I remember from the time I was on top of the slide and then in the hospital." Upon cross-examination he testified: "They were pushing too, they wanted to get there first. There are several boys and girls on the top of the platform and they were waiting to use the slide. I think this girl was with me too. I don't

know how many boys and girls were up there exactly, it was crowded. They were pushing me around, trying to get ahead of the line, there were some smaller boys up there and some about my age. I did a little pushing myself, I wasn't doing it to get ahead of the line, they were pushing me around. I pushed whoever I thought pushed me, I don't remember anybody giving me a push when I fell, off the platform. I remember I was on the platform, that is all. Anybody pushing around like that could have pushed me off there, it was possible for that to be done."

At the close of plaintiff's evidence, and again at the close of all the evidence, defendant moved, in writing, to instruct the jury to find defendant not guilty. The motions were denied. Defendant raises seven contentions: we need notice but one, viz: "The park, playground and slides having been maintained not for profit or revenue but for public health, recreation and amusement was maintained and operated by the defendant as a governmental function for which it was not liable in damages for its negligence or that of its servants." This contention must be sustained. See Gebhardt v. Village of LaGrange Park, 354 Ill. 234, where a like contention was carefully and fully considered, and decided in favor of the defendant in that case. Under that ruling it is clear that the trial court in the instant case erred in refusing to instruct the jury to find the issues for defendant.

As plaintiff, under the admitted facts, cannot recover, the judgment of the Superior court of Cook county is reversed.

REVERSED.

Gridley, P. J., and Sullivan, J., concur.

37567

45 7

YOLANDA IGYARTO, a minor, by the
Cook County Trust Company, a
corporation, her Guardian,
Appellee,

v.

YORE BROTHERS DAIRY COMPANY,
a corporation,
Appellant.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

278 I.A. 6294

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action on the case to recover damages for personal injuries sustained by plaintiff. A verdict was returned finding defendant guilty and assessing plaintiff's damages at the sum of \$1,500. Defendant has appealed from a judgment entered upon the verdict.

Plaintiff was injured in an accident that occurred on March 29, 1932, about 3 o'clock p. m., at the intersection of Lake street, which runs ^{east} and west, and Keeler avenue, which runs north and south.

The following is plaintiff's theory of fact: Plaintiff, six years of age, was on her way home from school with another girl of about the same age. The school was located on the east side of Keeler avenue, one block south of Lake street. To reach her home, located north of Lake street, plaintiff crossed Lake street on the east side of Keeler avenue. The two girls stepped from the curb together, "they were walking, holding hands, about three or four miles an hour." They stopped before they reached the eastbound car tracks on Lake street, glanced around, and then proceeded across the tracks. A one-horse milk wagon, owned by

24507

YOUNG, JAMES, a minor, by the
Cook County Trust Company, a
corporation, her co-defendant,
appellee,

v.

JOHN B. YOUNG, JR., a minor,
a corporation,
appellant.

24507

COOK COUNTY, ILLINOIS

COURT, JAMES COOK, JUDGE

MR. JUSTICE OF THE PEACE OF THE COUNTY OF COOK, ILLINOIS

an action on the case to recover damages for personal
injuries sustained by plaintiff. A verdict was returned finding
defendant guilty and assessing plaintiff's damages at the sum of
\$1,500. Plaintiff has applied for a judgment entered upon the
verdict.

Plaintiff was injured in an accident that occurred on
March 23, 1924, about 3 o'clock p.m., at the intersection of
Lake Street, which runs north and south, and Foster Avenue, which runs
east and west.

The following is plainiff's story of the accident:
Six years of age, and an only child from school with another child
of about the same age. The school was located on the east side of
Kearney Avenue, one block south of Lake Street. To reach her
home, located north of Lake Street, plaintiff crossed Lake Street
on the east side of Kearney Avenue. The two girls stopped from
the curb together. They were talking, holding hands, about three
or four miles an hour. They stopped before they reached the
eastbound car tracks on Lake Street, glanced around, and then pro-
ceeded across the tracks. A one-horse milk wagon, owned by

defendant, was proceeding east on the tracks and was about 25 or 30 feet from the girls when they stepped into the car track. The horse was trotting, the reins were not in the driver's hands and were hanging from the top of the wagon; the driver had his head bent down and was paying no attention to the horse, and Quinlan, a witness for plaintiff, observing that the driver was paying no attention to the horse, yelled to the driver to watch out, "there were kids on the crosswalk." The horse struck both of the children and threw them to the pavement. "The horse didn't stop - went about seventy-five feet before it stopped;" "it seems the horse stopped by himself." After the accident the driver got off of the wagon, ran to where Quinlan and a bystander, Ambrose, were, "and asked them what had happened." Quinlan testified that from curb to curb Lake street was about 70 or 75 feet; that the street car tracks occupied about 20 feet; that Keeler avenue from curb to curb was about 30 feet; that there was an elevated railroad super-structure running along Lake street; that the posts supporting the same were about 25 or 35 feet away from the curb, "out in the middle of the street, about three feet away from the street car tracks," that the posts "run in pairs all along there and are about forty feet apart." Dennis Harrington, the sole witness for defendant, testified as follows: That he was about 45 years of age and for 20 years had been a milkman driving a horse and wagon; that he had been employed by defendant for 10 years; that he was familiar with the place in question and had been traveling over it for ¹⁰ years; that just prior to the accident he was going east on Lake street and "had hold of the lines with both hands, and the horse was going along at the regular milk wagon pace * * * 5 miles an hour;" that he knew there was a school located on Keeler avenue; that as he approached that avenue he was on the eastbound tracks; that nothing

occurred when he passed the first superstructure pillar; that as he passed the next pillar his horse shied toward the north tracks and "there was two children behind the post there and they ran right into me;" that as he approached the east side of Keeler avenue he did not see the two girls; that after they ran into him he swung the horse over to the north track and stopped in 5 feet; that as he approached the place in question he was driving the horse and looking to the east; that after the accident he did not say to a bystander, "What happened?" that the first knowledge he had of the presence of the two girls was when his horse shied; that he knew that school children passed that point every day and because of that fact he slowed down just before the accident; that it was a nice day and the roadway was "just fine;" that the horse, because he was broken to the service, was deemed to have as much sense as the driver in going around the route; that as he approached the intersection in question he did not notice anybody standing at the intersection. Upon cross-examination he testified that the horse had blinders on and "could not see to the back of him;" that the horse was about four or five feet past the girls when he shied; that the witness did not see the girls at all until he "hit them;" that as he approached Keeler avenue he slowed the horse up to about two miles an hour; that as he reached that avenue he could see all the way to Crawford avenue; that there was nothing to obstruct his view ahead; that he did not see Quinlan after the accident; that the little girl was unconscious after the accident; that the little girls ran into the side of the wagon; that nobody was chasing them.

Defendant contends that the court should have directed the jury to return a verdict in favor of defendant either at the conclusion of plaintiff's case or at the conclusion of all the evidence. It is difficult for us to clearly understand from

occurred when he passed the first apartment building; that he
 he passed the next building his horse shied toward the north track
 and "there were two children running the race there and they ran
 right into me," that he was thrown about the west side of Market
 Avenue he did not see the girl; that after they ran into him
 he swung the horse over to the north track and stopped in a track;
 that as he approached the place in question he was driving the
 horse and looking to the east; that after the accident he did
 not say to a bystander, "that happened," that the first knowledge
 he had of the presence of the girl was when his horse shied;
 that he knew that school children passed that point every day and
 because of that fact he also went just before the accident; that
 it was a nice day and the roadway was "just fine"; that the horse,
 because he was broken to the service, was deemed to have as much
 sense as the driver in going around the corner; that as he approached
 the intersection in question he did not notice anybody standing at
 the intersection. Upon cross-examination he testified that the
 horse had shied on him "could not see to the back of him"; that
 the horse was about ten or five feet past the girl when he shied;
 that the driver did not see the girl at all until he "hit home";
 that as he approached Market Avenue he closed the horse up to about
 two miles an hour; that as he reached that avenue he could see all
 the way to Grand Street; that there was nothing to obstruct his
 view ahead; that he did not see anything after the accident; that
 the little girl was unconscious after the accident; that the little
 girl ran into the side of the wagon; that nobody was operating there.
 Defendant contends that the court should have directed
 the jury to return a verdict in favor of defendant either at the
 conclusion of plaintiff's case or at the conclusion of all the
 evidence. It is difficult for us to clearly understand from

the manner in which defendant argues the foregoing contention, its exact position. It is settled law that if a defendant seeks to have the case reviewed on plaintiff's evidence alone, he must stand on his motion to direct a verdict made at the close of plaintiff's evidence, and the participation in the trial thereafter is a waiver of such motion. In the instant case defendant proceeded with its defense after its motion to direct a verdict had been denied. In support of its contention defendant discusses the evidence introduced by plaintiff and by defendant and argues that its theory of fact should be believed instead of plaintiff's theory of fact. The first count of the declaration charges general negligence. The second count was withdrawn. The third count charges negligence in driving the wagon in question without keeping a reasonably careful lookout ahead in the direction in which the horse and milk wagon were moving. That plaintiff made out a prima facie case against defendant is clear. Counsel argues that as "the testimony pertaining to liability consists of evidence of two witnesses, one offered by the plaintiff and the other by the defendant," plaintiff has failed to prove her case by a preponderance of the evidence. In Jackson v. Ferson (App. Ct. Gen. No. 37,031, Abst. opinion), opinion rendered by this division of the court, we said:

"The preponderance of the evidence does not necessarily depend upon the number of witnesses testifying as to any material subject of inquiry. Even though the same number of witnesses testify on each side there may still be a preponderance on one side or the other. While the number of witnesses is a factor that may be taken into consideration in determining where the weight or preponderance of the evidence lies, it is not necessarily determinative, and a jury may be fully warranted in finding in favor of a party even if his case is supported by the lesser number of witnesses. It was the province of the jury to pass upon the credibility of the two witnesses and to determine the weight, if any, that should be attached to their testimony. 'The witness' manner, demeanor and bearing upon the stand,- his replies, whether frank and open or reluctant and evasive, - his manner of expressing himself, whether moderate, dignified and respectful on the one hand, or extravagant,

impertinent and reckless on the other, - * * * are always of vital importance in determining to what, if any, credit the witness is entitled.' (Ill. & St. L. R. R. & C. Co. v. Ogile, 92 Ill. 363, 362.) It is not the law that a verdict which rests alone upon the testimony of one party who is contradicted in toto by another, where both appear to be equally credible, will be set aside upon appeal. (See Bimer v. Miller, 255 Ill. App. 465, 470, and cases cited therein; Shevalier v. Seager, 121 Ill. 564, 570, Hayden v. Miller, 205 Ill. App. 147, 148; Mills & Co. v. Duke, 252 Ill. App. 277, 280.) As stated in this last mentioned case (p. 280): 'Even in a criminal case where the law requires proof of the defendant's guilt beyond a reasonable doubt, a judgment of conviction will not be reversed merely because only the complaining witness testifies to the commission of the crime and he is contradicted by the defendant. The People v. Greenberg, 302 Ill. 566; The People v. Bostcher, 298 Ill. 580; The People v. Maciejewski, 294 Ill. 390.' (See also Ryan v. Marty, 200 Ill. App. 470; Rollins v. Kroncke, 262 Ill. App. 648 (Abst.) In the late case of The People v. Fortino, 356 Ill. 415, 420, the court said: 'This court has frequently held that the testimony of one witness, even though denied by the accused, may be sufficient to sustain a conviction. People v. Schanda, 352 Ill. 36; People v. Zurek, 277 id. 621.'"

Even if the statement of defendant that each side produced only one witness was justified by the record, we would still be satisfied, after a careful examination of the testimony of Quinlan and the driver, that the jury would have been justified in finding for plaintiff. But in the instant case Joseph Igyarto, Jr., eleven years of age, a brother of plaintiff, testified that he was walking home from the school and at the time of the accident had reached the southeast corner of Lake street and Kesler avenue; that in order to reach their home, which was located north of Lake street, they had to pass the corner in question; that the milk wagon ran about 75 feet after it ran over the plaintiff; that the driver had his head down when he ran over the plaintiff and directly after the plaintiff was run over she screamed and at that moment the driver still had his head down. It is plain that plaintiff proved her case by a preponderance of the evidence. Moreover, the able and experienced trial judge sustained the verdict.

Defendant contends that "the damages assessed by the jury are excessive." We have carefully considered this contention and find it without merit. The evidence shows that the doctor's

bill was \$125, the hospital bill, \$47.75, and the bill of the nurse, \$32.50, so that the jury allowed plaintiff a little less than \$1,300 for her pain and injuries. In arguing the instant contention defendant contends that it is very doubtful as to whether or not the plaintiff sustained a fracture of the elbow. Dr. Wait testified that plaintiff sustained "a split of the proximal end of the ulna * * * a fracture of the proximal end of the elbow," and defendant did not see fit to cross-examine the witness nor to introduce any proof in rebuttal of his testimony. Dr. Kramer testified that he saw plaintiff at the Garfield Park hospital about 4 o'clock of the afternoon of the accident; that he examined her and found her semi-conscious, "in shock, with a rapid pulse, and cold, clammy skin;" that he immediately diagnosed the condition as one of shock; that she had suffered a severe injury to some part of her body, "and I suspected at first concussion of the brain;" that the next day he discovered a swelling of the right elbow. She complained of pains in the right elbow and suffered some pain in the abdomen; that plaintiff remained in the hospital for five days, when she was taken home; that before she left the hospital the right elbow was bandaged firmly "to retain the fragments in the proper position and to prevent movement of the elbow so that there would not be an unusual amount of scar tissue, - taped up;" that this tape remained on her elbow for about two weeks; that the doctor continued to see her until the time of the trial; that his last examination showed her to be anemic, underweight and extremely nervous; that he did not find her anemic condition to be the result of the accident. Upon cross-examination he testified that after the accident he found that the abdominal pains were caused "by a bruise of the abdominal wall, - pressure on the wall, of some sort. * * *

There were some hemorrhages of the skin - discoloration. * * *

She complained of those pains for about three weeks;" that he treated her for concussion of the brain for about five days, placing ice packs on her head. Defendant introduced no medical testimony, and from what we have heretofore stated it is apparent that the damages awarded by the jury are not excessive.

From the fact that defendant is forced to argue the appeal upon the sole contention that the evidence does not sustain the verdict, it is apparent that the case was fairly and ably tried.

The judgment of the Superior court of Cook county should be and it is affirmed.

AFFIRMED.

Gridley, P. J., and Sullivan, J., concur.

The statement of those who have been asked, that he
has been for some time in the prison for about five days,
placing the facts on his part. The statement is not
testimony, and even if it were, it is not
that the answer is not by any means necessary.

From the fact that the statement is made to show the
appeal upon the sole ground that the evidence does not sustain
the verdict, it is apparent that the case is fairly and fully
tried.

The statement of the Director of the Court of Cook County

should be and it is not.

Witness, P. J. and Sullivan, J. J. CONSENT.

37337

HARRY I. WEISBROD,
Appellee,

v.

PAUL V. SHIELDS, JOSEPH H. SEAMAN,
CONNELIUS SHIELDS, EDEBERG MOXHAM,
T. CLIFFORD BORMAN, JESS SHERTSER,
JAMES P. MAYER, ROBERT AYRES,
WARNER JONES and THOMAS H. STONBOROUGH,
copartners doing business as
SHIELDS & COMPANY,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

278 I.A. 630¹

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for \$1,087.50 rendered in favor of Harry I. Weisbrod, plaintiff, against the defendants, partners doing business as Shields & Company, in an action of contract tried by the court without a jury.

Plaintiff's claim is that May 31, 1933, on his order, defendants, who were stockbrokers, purchased for his account on margin 100 shares of Liquid Carbonic stock at \$33 a share; that he deposited with defendants approximately \$1,400 to cover the margin requirements on this stock; that June 14, 1933, defendants purchased for his account, without his knowledge or authority, 100 shares of Electric Bond & Share stock at \$39 a share; and that, because his deposit of approximately \$1,400 was insufficient to cover the margin requirements on the Liquid Carbonic stock, the purchase of which he authorized, and the Electric Bond & Share stock, purchased for his account without his knowledge or authority, defendants, June 15, 1933, sold the Liquid Carbonic stock at \$28.62½ a share and the Electric Bond & Share stock at \$32.50 a share, causing him a loss of \$1,087.50.

HARRY L. WHITE CO.,
Appellants,

v.

PAUL V. SMITH, JOSEPH H. LAMAR,
GEORGE L. SMITH, EDWARD L. SMITH,
T. EDWARD SMITH, JOHN L. SMITH,
JAMES C. SMITH, ROBERT A. SMITH,
JAMES H. SMITH and THOMAS H. SMITH, CUSK
copartners doing business as
SMITH & COMPANY,
Defendants.

APPEAL FROM
COURT OF COMMON PLEAS
OF THIS STATE.

1881 A. I. 680

MR. JUSTICE WILLIAM B. EATON, FOR PETITIONER OF HIS COURT.

This appeal seeks to reverse a judgment for \$1,027.50

rendered in favor of Harry L. White, plaintiff, against the
defendants, partners doing business as Smith & Company, in
an action of contract filed by the court without a jury.

Plaintiff's claim is that May 21, 1902, on his order,

defendants, who were stockbrokers, purchased for his account on
margin 100 shares of Liquid Carbonic stock at \$25 a share; that

he deposited with defendants approximately \$1,400 to cover the

margin requirements on this stock; that June 14, 1902, defendants

purchased for his account, without his knowledge or authority,

100 shares of Electric Bond & Share stock at \$25 a share; and

that, because his deposit of approximately \$1,400 was insufficient

to cover the margin requirements on the Liquid Carbonic stock,

the purchase of which he authorized, and the Electric Bond & Share

stock, purchased for his account without his knowledge or authority,

defendants, June 16, 1902, sold the Liquid Carbonic stock at

\$25.62½ a share and the Electric Bond & Share stock at \$25.75 a

share, causing him a loss of \$1,027.50.

Defendants' affidavit of merits admitted that they purchased at plaintiff's order 100 shares of Liquid Carbonic stock for his account and that he deposited with them approximately \$1,400 to cover the margin requirements on that stock, and averred that on plaintiff's express order and authority they purchased for his account June 14, 1933, 100 shares of Electric Bond & Share stock on his specific promise and agreement to deliver to them for sale 1,000 Commonwealth & Southern warrants, the proceeds of the sale of which were to be used to cover the margin requirements on the Electric Bond & Share stock; that he failed to deliver said warrants and that it became necessary June 15, 1933, in order to protect themselves, because of the sharp decline in the stock market on that day and because of plaintiff's failure to deliver the aforesaid warrants or to make an additional margin deposit, to sell the 100 shares of Liquid Carbonic stock and 50 shares of the Electric Bond & Share stock; that thereafter, upon his order, they sold the other 50 shares of Electric Bond & Share stock; that they delivered to him a check for \$253.47, representing the balance remaining in his account after the stocks were sold; and that all orders executed by them for plaintiff's account were executed at his instance and request and that any loss or damage sustained by him was caused by his own acts.

Defendants contend that the finding and judgment of the trial court are contrary to the law and against the manifest weight of the evidence; that, inasmuch as the proper decision of this cause must turn on the question of whether or not plaintiff on June 14, 1933, placed an order with defendants as brokers to purchase for his account 100 shares of Electric Bond & Share stock at \$39 a share, the evidence of plaintiff, who was the only witness in his own behalf as to this transaction, being so highly

witnesses in his own behalf as to this transaction, being as highly
 as 33 1/3 a share, the evidence of Plaintiff, who was the only
 purchase for his account 100 shares of Electric Bond & Share
 on June 14, 1935, placed an order with defendant as broker to
 this order was to turn on the question of whether or not Plaintiff
 weight of the evidence that, inasmuch as the proper action of
 the trial court was contrary to the law and against the manifest
 defendant contend that the finding and judgment of
 sustained by him was proper by his own acts.
 executed at his instance and request and that any loss or damage
 that all orders executed by them for Plaintiff's account were
 balance remaining in his account after the books were sold; and
 that they delivered to him a check for \$122.47, representing the
 they sold the other 30 shares of Electric Bond & Share stock;
 the Electric Bond & Share stock; that Plaintiff, upon his order,
 to sell the 100 shares of Electric Bond & Share stock and 30 shares of
 the aforesaid warrants or to make an additional margin deposit,
 market on that day and because of Plaintiff's failure to deliver
 protect themselves, because of the sharp decline in the stock
 warrants and that it became necessary June 15, 1935, in order to
 on the Electric Bond & Share stock; that he failed to deliver and
 the sale of which was to be used to cover the margin requirements
 to sell 1,000 Commonwealth & Southern warrants, the proceeds of
 stock on his specific promise and agreement to deliver to them
 his account June 14, 1935, 100 shares of Electric Bond & Share
 that on Plaintiff's express order and authority they purchased for
 \$1,400 to cover the margin requirements on that stock, and averred
 stock for his account and that he deposited with them approximately
 purchased as Plaintiff's order for shares of Electric Bond & Share
 and defendant's affidavit of Plaintiff stated that they

improbable and self contradictory as to be entirely unworthy of belief, and the testimony of defendants' witnesses, supported by documentary evidence, being conclusive that plaintiff placed the order and that it was executed in accordance with his instructions, as well as in accordance with the customs and usages then prevailing in the stock brokerage business, there was no competent evidence in the record to sustain the finding and judgment; that the trial court erroneously excluded evidence offered in defendants' behalf, which, with the competent evidence otherwise in the record which it corroborated, created a clear preponderance of the evidence in defendants' favor and entitled them to a finding and judgment; and that, even if plaintiff did not place this order with defendants in the first instance, he not only failed to repudiate it when he was notified that it had been executed for his account, as he was bound to do, but by his subsequent acts must be deemed to have ratified it.

Plaintiff's theory is that the questions presented for our determination were questions of fact for the trial court to decide, and that the finding and judgment are amply supported by competent evidence in the record and are in accordance with the law.

The undisputed facts are that plaintiff is an attorney at law, actively engaged in practice for seventeen years; that one J. J. McMahon, an office associate of his, on May 31, 1933, telephoned an order for the purchase on margin for plaintiff of 100 shares of Liquid Carbonic stock at \$33 a share to Mrs. Gries, a "customers' lady" of defendants, with whom Mr. McMahon was acquainted and had theretofore conducted stock transactions on his own account; that Mrs. Gries telephoned plaintiff to confirm the order and later telephoned him that the purchase had been made for his account; that plaintiff assured Mrs. Gries that he

improbable and a self-confessed story as to be entirely unworthy of belief, and the testimony of defendant's witnesses, supported by documentary evidence, being conclusive that plaintiff owed the order and that it was executed in accordance with his instructions, and that in the absence of the order and usage then prevailing in the stock brokerage business, there was no competent evidence in the record to sustain the finding and judgment; that the trial court erroneously excluded evidence offered in defendant's behalf, which

with the competent evidence otherwise in the record which it

concerned; and that a clear preponderance of the evidence in defendant's favor was admitted them to a finding and judgment; and that, even if plaintiff did not place this order with defendant

in the first instance, he was not only entitled to reimbursement when he was notified that it had been executed for his account, as he was bound to do, but by his subsequent acts must be deemed to

have ratified it.

Plaintiff's theory is that the questions presented for our determination were questions of fact for the trial court to decide, and that the finding and judgment are amply supported by competent evidence in the record and are in accordance with the law.

The undisputed facts are that plaintiff is an attorney

at law, actively engaged in practice for several years; that on July 1, 1930, an office associate of his, on May 31, 1935, telephoned an order for the purchase on margin for plaintiff of 100 shares of United States Steel at \$35 a share to Mrs. Gries, a "competent" lady of defendant, with whom Mr. McKeehan was

acquainted and had theretofore conducted stock transactions on his own account; that Mrs. Gries telephoned plaintiff to confirm the order and later telephoned him that the purchase had been made for his account; that plaintiff assumed Mrs. Gries that he

would, in lieu of cash to cover such purchase on margin, deliver to defendants 30 shares of Electric Bond & Share stock; that such stock was not delivered to defendants that day as promised, but was delivered the next day, June 1, 1933; that this Electric Bond & Share stock, which purported to be 30 shares, amounted in fact to only 20 shares of the new stock of that company; that, subsequently, plaintiff ordered defendants to sell that stock at \$40 a share, which they did June 12, 1933, realizing \$800 from such sale, which was placed to plaintiff's credit in his margin account for the Liquid Carbonic stock; that such amount was insufficient for plaintiff's margin requirements and that he was so notified by defendants; that in response to such notice he delivered to defendants a check for \$627, which, after certain deductions, gave him an aggregate credit of approximately \$1,400 in his margin account; that June 14, 1933, defendants purchased for plaintiff's account 100 shares of Electric Bond & Share stock at \$39 a share; that on the same day plaintiff placed an order with defendants to sell 1,000 Commonwealth & Southern warrants at from \$1.50 to \$1.75 each; that these warrants were not sold by defendants because plaintiff failed to deliver them; that plaintiff delivered neither money nor securities to defendants to cover the purchase on margin of the 100 shares of Electric Bond & Share stock; that, when the market opened on the morning of June 15, 1933, there was carried in plaintiff's account with defendants 100 shares of Liquid Carbonic stock purchased at \$33 a share, 100 shares of Electric Bond & Share stock purchased by defendants at \$39 a share and charged to said account and a cash credit of approximately \$1,400; that there was a sharp decline in the stock market that day and defendants sold the 100 shares of Liquid Carbonic stock purchased for plaintiff's account, as well as the 100 shares of Electric Bond & Share stock; that the Liquid

would, in lieu of cash, be given such number as was required, delivery
to defendant of shares of Electric Bond & Share Stock; at which
stock was not delivered to defendant this day as promised, but
was delivered the next day, June 1, 1933; that this time it was
a share stock, which was supposed to be 100 shares, amounting in fact
to only 50 shares of the new stock of Electric Bond & Share
Company, Plaintiff ordered defendant to sell this stock at 100
shares, which they did June 12, 1933, realizing \$500 from such sale,
which was placed to Plaintiff's credit in his margin account for the
liquidation of stock; that such amount was insufficient for plain-
tiff's margin requirements and that he was so notified by defendant;
that in response to such notice he delivered to defendant a check
for \$250, which, after certain deduction, gave him an amount
of approximately \$140 in his margin account; that June 14,
1933, defendant purchased for Plaintiff's account 100 shares of
Electric Bond & Share stock at \$50 a share; that on the same day
Plaintiff placed an order with defendant to sell \$1,000 Commonwealth
& Southern Securities at from \$1.50 to \$1.75 each; that these orders
were not sold by defendant because Plaintiff failed to deliver
to him that Plaintiff delivered other money for delivery to
defendant to cover the purchase on margin of the 100 shares of
Electric Bond & Share stock; that, when the market opened on the
morning of June 15, 1933, there was a run in Plaintiff's account
with defendant for shares of Electric Bond & Share stock purchased by
\$25 a share, 100 shares of Electric Bond & Share stock purchased by
defendant at \$25 a share and charged to said account, and a cash
credit of approximately \$1,400; that there was a sharp decline in
the stock market that day and defendant sold the 100 shares of
Electric Bond & Share stock purchased for Plaintiff's account, at well
as the 100 shares of Electric Bond & Share stock; that the liquid

Carbonic stock was sold at \$28.62½ a share and the Electric Bond & Share stock at \$32.50 a share; and that June 17, 1933, plaintiff received from defendants a check for \$255.47, representing the balance remaining in his account after the sale of the aforementioned stocks, which was paid in due course.

The crucial question in this cause is: Did plaintiff request or authorize Mrs. Gries to purchase for his account 100 shares of Electric Bond & Share stock June 14, 1933, or did she without such authorization and on her own initiative and responsibility purchase that stock and charge it against plaintiff's account? On this issue the evidence was in sharp conflict.

Plaintiff testified that he did not request or authorize defendants to purchase this stock for him. Mrs. Gries testified unequivocally that June 14, 1933, at 9:30 a. m., plaintiff telephoned her placing an order for the purchase of 100 shares of Electric Bond & Share stock at \$39 a share and another order for the sale of 1,000 Commonwealth & Southern warrants, the proceeds of the sale of the warrants to meet the margin requirements on the purchase of the Electric Bond & Share stock; and that she telephoned plaintiff before 10 a. m. that day that she had consummated the purchase of the Electric Bond & Share stock for him. Plaintiff admits that he gave the order for the sale of the Commonwealth & Southern warrants, which were not sold because of his failure to deliver them to defendants.

As to defendants' contention that the trial court erred in excluding from the evidence certain buy and sell orders, including Mrs. Gries' memorandum order for the purchase of 100 shares of Electric Bond & Share stock, which she stated plaintiff gave her over the telephone and which she said she wrote at the time he gave it to her, it is sufficient to state that these orders could not be

On 11/11/41, a check for \$100.00 was cashed at the Federal Reserve Bank of New York, New York, and the proceeds were deposited in the account of the Federal Reserve Bank of New York, New York, for the account of the Federal Reserve Bank of New York, New York.

The General Question in this case is: Did the United States or authorities there, prior to September 1940, have any knowledge of the fact that the Japanese Government was in the process of purchasing large quantities of aircraft from the United States? The answer to this question is: No.

[illegible]

regarded as an account book of original entries, the entries in which become admissible in evidence when proven under the provisions of section 3, chapter 51, Cahill's Illinois Revised Statutes. They were not signed by plaintiff and were mere memoranda which might have been resorted to to aid the memory of a witness, but not as proof of a disputed fact. (Boyle v. Jennings, 46 Ill. App. 290; Cairns v. Hunt, 78 Ill. App. 420; Brooks v. Funk, 85 Ill. App. 631; Sealey v. Minturn et al., 267 Ill. App. 609.)

The fact that such memorandum orders became part of the permanent records of defendants did not tend to prove or disprove any issue in this cause. The execution of the orders is not only conceded but protested. It is the authority of Mrs. Gries, defendants' agent, to execute the order in question that is disputed. Such memoranda made by a witness at the time of the alleged transactions, as part of the duty or employment of such witness and in the usual course of business, could, of course, have been used to refresh the witness' recollection, if that were necessary. But it was unnecessary, even for that purpose, in the instant case because Mrs. Gries testified that she had a clear and distinct recollection of the transactions. Therefore, the memorandum orders could only be secondary evidence to Mrs. Gries' original testimony as to her version of what actually occurred, and we think that no harmful error resulted ^{from} / their exclusion.

It is also contended that the trial court erred in excluding the testimony of defendants' witness Peil, a "customers' man," who occupied the same small office with Mrs. Gries and sat within three or four feet of her telephone, as to what he heard of certain telephone conversations between Mrs. Gries and plaintiff. All of plaintiff's business with defendants had theretofore been transacted with Mrs. Gries over the telephone and she and plaintiff

regarded as an account book of criminal activities, the entries in which become admissible in evidence when proven under the provisions of section 14, Chapter 22, Criminal Evidence Law, Illinois. They were not signed by Plaintiff and were memoranda which might have been recorded to aid the memory of a witness, but not as proof of a disputed fact. (Boyle v. Johnson, 48 Ill. App. 2d 220; Callan v. Hunt, 78 Ill. App. 480; Wicks v. Cook, 88 Ill. App. 231; Boyle v. Johnson, 48 Ill. App. 220.)

The fact that such memorandum entries become part of the permanent records of defendant did not tend to prove or disprove any issue in this cause. The admission of the entries is not only conceded but protested. It is the authority of the trial court, to exclude the entries in question that is disputed. Such memoranda made by a witness at the time of the alleged transaction, as part of the duty or employment of such witness and in the usual course of business, could, of course, have been used to refresh the witness' recollection, if that were necessary. But it was unnecessary, even for that purpose, in the instant case because Mrs. Gries testified that she had a clear and distinct recollection of the transaction. Therefore, the memorandum entries could only be secondary evidence to Mrs. Gries' original testimony as to her recollection of what actually occurred, and we think that no harmful error resulted from their exclusion.

It is also contended that the trial court acted in excluding the testimony of defendant's witness with a "witness card." She occupied the same small office with Mrs. Gries and was with them at least part of her telephone, as to that we have no certain telephone conversation between Mrs. Gries and Plaintiff. All of Plaintiff's business with defendant has heretofore been transacted with Mrs. Gries over the telephone and she and Plaintiff

were the only direct witnesses to the telephone conversation that concerned the order in question. Their statements were absolutely irreconcilable, and to establish a preponderance every item of competent evidence fairly tending to corroborate or contradict either of them was material. The court permitted the witness Peil to testify as to these telephone conversations and then on plaintiff's motion all such testimony was ordered stricken. We think the court erred in so doing. While some of the testimony of the witness was incompetent and should have been stricken, we are of the opinion that it was proper, when the party at the other end of the telephone conversation was identified, and both parties to the conversation testified concerning it and it involved the controversy before the court, to permit the witness to state what he heard of the conversation pertinent to the subject matter of the litigation. Peil testified that he knew prior to June 14, 1933, that plaintiff had an account with defendants and that, when Mrs. Ories' telephone rang on the occasion of the conversation in question, he heard her answer the call and say, "How do you do, Mr. Weisbrod." Many authorities of this and other jurisdictions hold that a telephone conversation between parties to the proceeding upon the subject matter of the litigation, having been testified to by one of the parties, may also be testified to by a bystander insofar as he heard it.

Where the competency of the testimony of a bystander to a telephone conversation under similar circumstances was presented to our Supreme Court in Miles v. Andrews, 153 Ill. 262, the court said at page 267:

"Wells Andrews also testified: 'Prior to signing these notes my son had asked me to sign them. My son and I then went to the telephone office together, and then Robert went to the telephone and called for P. B. and C. C. Miles, and they rang, and he says, "Philo, is that you?" Did not hear the answer. Then Robert said "I have been down to see uncle Johnny to go on the notes, and he said he had got sick and tired of gambling in these options, and would not go on the note, but father would," and then turned around and said, "Philo says it is all right."' The

were the only direct witnesses to the telephone conversation that concerned the order in question. Their statements were absolutely irreconcilable, and to establish a preponderance very item of competent evidence fairly leading to contradictory or contradictory either of them was material. The court permitted the witness to testify as to these telephone conversations and then on Plaintiff's motion all such testimony was ordered excluded. I think the court erred in so doing. While some of the testimony of the witness was incompetent and should have been excluded, he is of the opinion that it was proper, when the party at the other end of the telephone conversation was identified, and both parties to the conversation testified concerning it and it involved the controversy before the court, to permit the witness to state what he heard of the conversation pertinent to the subject matter of the litigation. He testified that he knew prior to June 14, 1935, that Plaintiff had an account with defendants and that, when Mrs. Gies, telephone rang on the occasion of the conversation in question, he heard her answer the call and say, "How do you do, Mr. 'Telephoned'." Many authorities of this and other jurisdictions hold that a telephone conversation between parties to the proceeding upon the subject matter of the litigation, having been testified to by one of the parties, may also be testified to by a bystander insofar as he heard it. Where the competency of the testimony of a bystander to a telephone conversation under similar circumstances was presented to our Supreme Court in Wiles v. Andrews, 183 Ill. 262, the court said at page 267:

"While Andrews also testified, 'Prior to signing these notes my son had asked me to sign them. My son and I then went to the telephone office together, and then Robert went to the telephone and called for W. B. and G. C. Wiles, and they rang, and he says, 'Hello, is that you?' I did not hear the answer. Then Robert said 'I have been down to see Uncle Johnny to go on the notes, and he said he had got sick and tired of gambling in these notes, and would not go on the notes, but father would,' and then turned around and said, 'This says it is all right.' The

witness did not hear the answers, and did not of his own knowledge know that Robert was at the time talking to Philo, if to any one. Counsel for appellants insist that this testimony was incompetent. Robert Andrews testified that he talked to Philo B. Miles at the time spoken of by his father. The conversation being thus shown to have been between two of the parties to the suit, and upon the subject matter of the litigation, was, we think, competent, though perhaps entitled to little weight."

While the weight to be given to the testimony of bystanders hearing one end of such telephone conversations is to be determined by the trier of the facts, under the peculiar circumstances of each case, this question was settled in favor of the admissibility of such testimony in the Miles case, supra, and following that case we must hold that it was error to reject the testimony of Peil as to what he heard Mrs. Greis say through the telephone to plaintiff. (Snively v. Colburn, 73 Ill. App. 93; Bates v. Cronin Estate, 196 Ill. App. 178.) This rule also finds support in a note on page 53, 71 A. L. R., and cited cases from Colorado, Indiana, Iowa, Massachusetts, Michigan, Mississippi, Missouri, New York, North Carolina, Ohio, Pennsylvania and Canada.

We have carefully examined and considered plaintiff's evidence in its entirety and, because of the many contradictions contained therein and because of the error of the trial court in rejecting the competent evidence of defendants' witness Peil, think that the interests of justice will be best served by a retrial of this cause. Inasmuch as this case will in all likelihood be tried again, we have purposely refrained from commenting upon or discussing in detail the evidence of plaintiff and Mrs. Gries. Other points have been urged, but in the view we take of this proceeding we deem it unnecessary to discuss them.

For the reasons indicated herein the judgment of the Municipal court is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Scanlan, J., concur.

37462

IN RE ESTATE OF JOHN W. MARSHALL,
deceased.

CYRUS S. EATON and SELDEN E. KLINE,
copartners, doing business as
Otis & Co.,

Plaintiffs in Error,

v.

HELEN M. SHADDOCK, as administratrix
of the estate of JOHN W. MARSHALL,
deceased,

Defendant in Error.

WARRANT TO

CIRCUIT COURT,

COOK COUNTY.

278 I.A. 630²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Otis & Company filed a claim in the Probate court of Cook county against the estate of John W. Marshall which was disallowed. October 13, 1933, the Circuit court entered an order dismissing claimants' appeal from the order of disallowance, affirming the order of disallowance and denying the motion, supported by verified petition of Cyrus S. Eaton and Selden E. Kline, copartners, doing business as Otis & Company, and the real claimants in the cause, to amend the record by substituting their own proper names as claimants in lieu of Otis & Company. This writ of error is brought to reverse the order of the Circuit court.

The claim herein was filed within the year required by statute against the estate of John W. Marshall, deceased, under the name of Otis & Company, and a statement showing a balance of \$3,603.14 due upon open account from decedent was attached. At the hearing on the claim in the Probate court, which occurred after the expiration of the year, it appeared from the evidence

2722

IN THE STATE OF IOWA, MARSHALL,
deceased.

OTIS & COMPANY and SEYMOUR R. KLINE,
copartners, doing business as
Otis & Co.,
Plaintiffs in Error,

v.

WILLIAM W. MARSHALL, an administrator
of the estate of JOHN W. MARSHALL,
deceased,
Defendant in Error.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Otis & Company filed a claim in the Probate Court of Cook county against the estate of John W. Marshall which was disallowed. October 13, 1923, the Circuit Court entered an order dismissing claimants' appeal from the order of disallowance, affirming the order of disallowance and denying the motion, supported by verified petition of Cyrus W. Eaton and Edwin H. Kline, copartners, doing business as Otis & Company, and the real claimants in the cause, to amend the record by substituting their own proper names as claimants in lieu of Otis & Company. This writ of error is brought to reverse the order of the Circuit Court. The claim herein was filed within the year required by statute against the estate of John W. Marshall, deceased, under the name of Otis & Company, and a statement showing a balance of \$5,803.14 due upon open account from deceased was attached. At the hearing on the claim in the Probate Court, which occurred after the expiration of the year, it appeared from the evidence

RETURN TO
CIRCUIT COURT,
COOK COUNTY.

278 I.A. 630

that the claimant was a partnership. Before a final order was entered in the Probate court disallowing the claim a petition was presented by claimant, Otis & Company, for leave to amend to make the partners claimants. This petition was denied and an order was entered disallowing the claim.

At the hearing on appeal to the Circuit court and before the taking of any testimony a petition of Cyrus S. Eaton and Selden E. Kline, copartners, doing business as Otis & Company, was filed, with leave of court, alleging that they were the claimants, and praying leave to substitute their own proper names as claimants in the place of Otis & Company, their trading name. This petition was denied and thereupon evidence was offered in support of their claim, but it was not admitted.

The following offer of proof was then made on behalf of Cyrus S. Eaton and Selden E. Kline:

"I wish to offer in evidence by this and other witnesses, proof that the decedent herein, at the time of his death, was indebted to Otis & Company, which partnership consisted of Selden E. Kline and Cyrus S. Eaton and John W. Darrow, in the sum of \$3,603.14, on an account stated; that after the death of the said decedent, John S. Darrow withdrew from the partnership, and that the said Selden Kline and Cyrus S. Eaton succeeded to all rights of John W. Darrow to the aforesaid indebtedness of John W. Marshall. That thereafter a claim was filed in the name of Otis & Company on behalf of Cyrus S. Eaton and Selden E. Kline for the aforesaid indebtedness; that when a hearing was had in the Probate Court it was shown in evidence that Cyrus S. Eaton and Selden E. Kline were copartners of Otis & Company, a partnership, upon whose behalf said claim was filed, and were the only parties in interest."

Objection was made and sustained to this offer.

Claimants contention is that a claim filed in the Probate court under the trading name of a partnership is sufficient to bring the claimant before the court and that the claim may be amended to substitute the proper names of the partners in the event of an objection to the form of the claim.

Counsel for the estate insists that the order of the Circuit court should be affirmed on any one or all of the several

that the claimant was a partnership. Before a final order was entered in the Probate Court the following claim a position was presented by claimant, Cline & Company, for leave to amend to make the partners claimants. This position was denied and an order was entered dismissing the claim.

At the hearing on appeal to the Circuit Court and before the taking of any testimony a petition of Cyrus H. Nelson and Nelson H. Kline, co-partners, doing business as Cline & Company, was filed, with leave of court, alleging that they were the claimants, and praying leave to substitute their own proper names as claimants in the place of Cline & Company, their trading name. This position was denied and thereupon evidence was offered in support of their claim, but it was not admitted.

The following offer of proof was then made on behalf of

Cyrus H. Nelson and Nelson H. Kline:

"I wish to offer in evidence by this and other witnesses, proof that the defendant herein, at the time of his death, was indebted to Cline & Company, which partnership consisted of Nelson H. Kline and Cyrus H. Nelson and John W. Dutton, in the sum of \$5,000.00, on account stated; that after the death of the said defendant, John W. Dutton withdrew from the partnership, and that the said Nelson Kline and Cyrus H. Nelson succeeded to all rights of John W. Dutton to the above said indebtedness of John W. Dutton. That thereafter a claim was filed in the name of Cline & Company on behalf of Cyrus H. Nelson and Nelson H. Kline for the aforesaid indebtedness; that when a hearing was had in the Probate Court it was shown in evidence that Cyrus H. Nelson and Nelson H. Kline were co-partners of Cline & Company, a partnership, upon whose behalf a claim was filed, and was the only person in interest."

Objection was made and sustained to this offer.

Claimants contended in that a claim filed in the Probate Court under the trading name of a partnership is sufficient to bring the claimant before the court and that the claim may be amended to substitute the proper name of the partners in the event of an objection to the form of the claim.

Verdict for the estate inasmuch that the order of the Circuit Court should be affirmed on any one or all of the several

grounds advanced and argued by him, but, in our opinion, the only issue involved in our review of this proceeding is the right of the partners, Eaton and Kline, to have their own proper names substituted for the name of Otis & Company.

In the case of Trustees v. Estate of James Paxton, 180 Ill. App. 658, where one James Paxton subscribed in writing to pay \$1,000 toward the building of a new church, which subscription he thereafter refused to pay, and a claim was filed against his estate to enforce its payment, the court said at page 660:

"Upon the contention that no legal claim was properly filed against the estate, we find that the claim was originally filed in the name of the Presbyterian church of Kansas against the estate of James Paxton. This claim was filed within the year required by statute, and after the year had expired the claim was amended so that the claimant was made to appear as The Trustees of the Old School Presbyterian Church, this amendment having been made by leave of the court. The Presbyterian Church is a religious organization, and under the statute where a body is organized for religious worship its property and funds are controlled by a board of trustees, and the record shows a sufficient organization of this society and the proper exercise and control of its property by the trustees, and as such it had the power to sue and be sued. The amendment of the claim by naming the Board of Trustees of the Old School Presbyterian Church as claimant was legal and proper and the court rightfully permitted this amendment; it was not the commencement of a new action or the filing of a new claim, the cause of action remained the same and the only difference that the amendment could have made was to show the proper name of the party proper to maintain the action."

In this state liberal interpretation has been accorded to the rules governing procedure in the filing of claims in the Probate court. It has repeatedly been held that any claim is sufficient that gives all of the information necessary to identify it and to apprise those concerned of its general nature and character and the amount claimed. In the instant case we think that the amendment sought in the Probate court before judgment was entered would not have constituted the filing of a new claim, but would have simply allowed the prosecution of the same claim with the proper claimants substituted for the firm name under which the claim was inaptly

grounds advanced and argued by him, but, in our opinion, the only parties involved in our review of this proceeding is the right of the partners, Kwon and Kline, to have their own proper names substituted for the name of Otis & Company.

In the case of Trustees v. Estate of James Jackson, 180 Ill. App. 688, where one James Jackson subscribed in writing to pay \$1,000 toward the building of a new church, which subscription he thereafter refused to pay, and a claim was filed against his estate to enforce its payment, the court said at

page 689:

"Upon the contention that no legal claim was properly filed against the estate, we find that the claim was suitably filed in the name of the Presbyterian Church of Kansas against the estate of James Jackson. This claim was filed within the year required by statute, and after the year had expired the claim was amended so that the claimant was made to appear as the Trustees of the Old School Presbyterian Church, this amendment having been made by leave of the court. The Presbyterian Church is a religious organization, and under the statute where a body is organized for religious worship the property and funds are controlled by a board of trustees, and the record shows a sufficient organization of this society and the proper exercise and control of its property by the trustees, and as such it had the power to sue and be sued. The amendment of the claim by naming the Board of Trustees of the Old School Presbyterian Church as claimant was legal and proper and the court rightfully permitted this amendment. It was not the amendment of a new action or the filing of a new claim, the cause of action remained the same and the only difference that the amendment could have made was to show the proper name of the party proper to maintain the action."

In this case liberal interpretation has been accorded to the rules governing procedure in the filing of claims in the Probate Court. It has repeatedly been held that any claim is sufficient that gives all of the information necessary to identify it and to advise those concerned of its general nature and character and the amount claimed. In the instant case we think that the amendment sought in the Probate Court before judgment was entered would not have constituted the filing of a new claim, but would have simply allowed the prosecution of the same claim with the proper claimants substituted for the firm name under which the claim was originally

filed. Where the statute has not provided otherwise the rule undoubtedly is that a copartnership must sue in the name of those composing it rather than in its firm name. Authorities are legion, however, that hold even where common law actions have been brought in the firm name only and pleas in abatement or in the nature of a plea in abatement were sustained to such action for that reason, that then amendments may be allowed to substitute the individual copartners as the proper parties plaintiff. (Ives v. Muhlenberg, 135 Ill. App. 517, and cases cited therein.)

The motion to amend having been properly made in the Probate court the petition to substitute Eaton and Kline, the individual partners, for the firm name of Otis & Company, presented to the Circuit court was clearly within the purview of the appeal to that court, and the allowance of the proposed amendment would not have constituted the commencement of a new action or the filing of a new claim in that court any more than it would have in the Probate court.

We are constrained to hold that the refusal of the Circuit court to allow the amendment substituting the individuals composing the copartnership for the firm name so that they might have a hearing on the merits of their claim was an unwarranted denial to Eaton and Kline of their rights under the law.

For the reasons indicated herein the order of the Circuit court is reversed and the cause is remanded with directions to permit the record to be amended by allowing the motion of Eaton and Kline to substitute their own proper names as claimants for the name of Otis & Company, and for such further proceedings as are in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley, P. J., and Scanlan, J., concur.

... When the statute has not provided otherwise the rule
 undoubtedly is that a corporation may sue in the name of
 those composing it rather than in its own name. ...
 are taken, however, that hold even where common law actions
 have been brought in the firm name only and since in substance
 or in the nature of a plea in abatement were sustained to such
 action for that reason, that when amendments may be allowed to
 substitute the individual partners as the proper parties
 plaintiff. (See 7. W. 188, 123 N.E. 2d 415, and cases
 cited therein.)

The motion to amend having been properly made in the
 proper court the petition to substitute Eaton and Kling, the
 individual partners, for the firm name of C. S. & Company,
 presented to the Circuit Court was correctly within the power
 of the court to grant, and the allowance of the proposed
 amendment would not have constituted the commencement of a new
 action or the filing of a new claim in that court any more than
 it would have in the Probate Court.

We are constrained to hold that the refusal of the
 Circuit Court to allow the amendments substituting the individuals
 composing the partnership for the firm name so that they might
 have a hearing on the merits of their claim was an unwarranted
 denial to Eaton and Kling of their rights under the law.

For the reasons indicated herein the order of the
 Circuit Court is reversed and the cause is remanded with directions
 to permit the record to be amended by allowing the motion of Eaton
 and Kling to substitute their own proper names as plaintiffs for
 the name of C. S. & Company, and for such further proceedings as
 are in conformity with this opinion.

REVEREND AND HONORABLE JUSTICE OF THE COURT.

W. J. and Thomas, J. J. ...

37576

THOMAS F. CROKE,
Appellee,

v.

KANE FUEL COMPANY,
a corporation,
Appellant.

48 7
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

278 I.A. 630³

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for \$2,586.86 entered January 22, 1934, against defendant and in favor of plaintiff in a first class contract action in the Municipal court, tried by the court without a jury.

Defendant, Kane Fuel Company, a corporation (hereinafter referred to as the company), through its president, Thomas J. Kane, solicited plaintiff to enter its employ as a salesman. As a result of such solicitation a written contract was entered into May 1, 1931, between defendant and plaintiff wherein defendant agreed to employ plaintiff for one year at a salary of \$1,500 a year and 3% commission on gross sales; to have its president sell to plaintiff 25 shares of the capital stock of the company at \$100 a share; and to refrain from increasing the salaries of its executive officers so that plaintiff might be sure of the possibility of earning a profit on the stock purchased by him. At that time Thomas J. Kane, defendant's president, was the owner of 193 shares of the capital stock of the company, his son was the owner of 1 share and Helene E. Johanssen, the secretary of the company, was the owner of 1 share. Plaintiff paid Kane \$2,500 for the 25 shares of stock and a certificate for same was issued to him by defendant.

27478

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF THOMAS J. LANE

S78 I.A. 680

THOMAS J. LANE, deceased,
Applicant,

vs.
THE LANE COMPANY,
Respondent.

COMES NOW the Respondent, The Lane Company, and moves for an order that the Applicant, Thomas J. Lane, be removed from the office of President of the Lane Company.

This motion is made for the reasons set forth in the accompanying affidavit.

The Applicant, Thomas J. Lane, was elected President of the Lane Company on January 22, 1934, and has since that time acted in that capacity. He is a first class contractor in the building trade, and has been so for many years.

The Lane Company is a corporation organized under the laws of the District of Columbia, and has its principal office at 1400 K Street, N.W., Washington, D.C. The Applicant, Thomas J. Lane, is the sole owner of the Lane Company, and has been so for many years.

On or about January 22, 1934, the Applicant, Thomas J. Lane, entered into a contract with the Lane Company, whereby he agreed to act as President of the Lane Company for a term of one year, and to receive a salary of \$1,000 per year, and a commission on the net profits of the Lane Company.

The Applicant, Thomas J. Lane, has since that time acted in that capacity, and has received the salary and commission provided for in the contract. He has also acted as President of the Lane Company for the purpose of obtaining the net profits of the Lane Company for himself.

The Respondent, The Lane Company, has since that time acted in that capacity, and has received the salary and commission provided for in the contract. It has also acted as President of the Lane Company for the purpose of obtaining the net profits of the Lane Company for itself.

The Respondent, The Lane Company, has since that time acted in that capacity, and has received the salary and commission provided for in the contract.

Very respectfully,
The Lane Company

There was also executed May 1, 1931, a contract between Thomas J. Kane and plaintiff whereby it was agreed that, in the event plaintiff did not continue in defendant's employ after the expiration of the year specified in the above contract, Kane would repurchase from him the 25 shares of defendant's stock at the same price plaintiff paid for it.

May 2, 1932, the company and plaintiff entered into a second written contract covering the year beginning with that date that contained the same terms as to employment, salary and commission as the contract for the previous year, and provided that the company "agrees that at the expiration of said One (1) year of employment, if the said employment is not continued or renewed by mutual agreement of said second party and said KANE FUEL COMPANY, to repurchase from second party said TWENTY FIVE (25) shares of capital stock at the price of TWENTY FIVE HUNDRED (\$2,500) DOLLARS, cash, said repurchase to be made within Ten (10) days after the expiration of said One (1) year employment; * * * (plaintiff) agrees that if said One (1) year employment is not renewed or continued, as aforesaid, to sell to the party of the first part the said TWENTY FIVE (25) shares of capital stock at the price of TWENTY FIVE HUNDRED (\$2,500) DOLLARS, cash, said stock to be delivered and said sale to be consummated within Ten (10) days after said one (1) year of employment." This contract was executed in defendant's behalf by Thomas J. Kane, president, and Helene E. Johannsen, secretary.

Immediately after plaintiff purchased the stock of defendant and entered into its employ he was elected vice president and remained such during his employment with the company. Plaintiff testified that he was also elected a director of the company at the same time, but his testimony on that point is disputed. Plaintiff also testified that in the latter part of April, 1933, he tendered

There was also executed May 1, 1931, a contract between

Thomas J. Lane and Plaintiff whereby it was agreed that, in the event Plaintiff did not receive a dividend's worth of the stock of the corporation or the year specified in the above contract, Lane would repurchase from him the 10 shares of defendant's stock at the same price Plaintiff paid for it.

May 1, 1931, the company and Plaintiff entered into a second written contract covering the year beginning with that date that contained the same terms as to payment, salary and commission as the contract for the previous year, and provided that the company "agree that at the expiration of said one (1) year of employment, if the said employment is not renewed or renewed by mutual agreement of said second party and said Lane, Plaintiff, to repurchase from second party said 10 shares of capital stock at the price of FIFTY FIVE DOLLARS (\$55.00) cash, said repurchase to be made within ten (10) days after the expiration of said one (1) year of employment; * * * (Plaintiff) agrees that if said one (1) year employment is not renewed or continued, as aforesaid, to sell to the party of the first part the said 10 shares of capital stock at the price of FIFTY FIVE DOLLARS (\$55.00) cash, said stock to be delivered and said sale to be completed within ten (10) days after said one (1) year of employment." This contract was executed in defendant's behalf by Thomas J. Lane, president, and signed E. Johansson, secretary.

Immediately after Plaintiff purchased the stock of defendant and entered into the aforesaid two contracts, Plaintiff and remained such during his employment with the company. Plaintiff testified that he was also elected a director of the company at the same time, but his testimony on that point is disputed. Plaintiff also testified that in the latter part of April, 1931, he purchased

his written resignation to defendant to the following effect:

"Dear Mr. Kane: I hereby tender my resignation as vice president of the Kane Fuel Company and salesman, to take effect May 1, 1933. In accordance with your contract please make arrangements to repurchase my stock."

Defendant contends that in the absence of express authority of the board of directors of the corporation its officers were without power or authority to enter into a contract on its behalf which would bind it to purchase its own capital stock, especially where no benefit would accrue to the corporation inasmuch as the stock had been originally purchased from Thomas J. Kane, its president, as an individual, and the corporation did not receive the purchase price paid by plaintiff for the stock; and that, even though the contract of May 2, 1932, was binding upon defendant, plaintiff did not comply with its terms in that he failed to offer such stock to defendant for repurchase within ten days after the expiration of his employment as provided in said contract.

Plaintiff's theory is that the president of the company had the power and authority to enter into the contract to purchase the stock of defendant company which plaintiff had theretofore purchased pursuant to the terms of the original contract between plaintiff and defendant; that, inasmuch as all of the officers of the corporation had knowledge of the contract and all of its stockholders, except William J. Kane, who held only one share of stock and who had knowledge of the contract and voiced no objection to it, actually signed the contract and the corporation received and accepted its benefits during the entire period covered by it, the defendant must be held to have ratified the contract and to have estopped itself from questioning the power of its president and secretary to execute it in its behalf; that he tendered the stock to defendant and de-

his written statement is attached to the following effect:
"Dear Mr. Jones: I hereby tender my resignation as Vice President
of the East End Company and Chairman, to take effect May 1, 1932,
in accordance with your written plan and agreement to
repeal the by-laws."

Plaintiff contends that in the absence of express authority
of the board of directors of the corporation the officers were without
power or authority to enter into a contract on its behalf which would
bind it to purchase its own capital stock, especially where no benefit
would accrue to the corporation inasmuch as the stock had been
originally purchased from Thomas J. Jones, its President, as an in-
dividual, and the corporation did not receive the purchase price paid
by Plaintiff for the stock; and that, even though the contract of
May 2, 1932, was binding upon defendant, Plaintiff did not comply
with its terms in that he failed to effect cash stock so required
for a period of ninety days after the expiration of his agreement
as provided in said contract.

Plaintiff's theory is that the President of the company
had the power and authority to enter into the contract to purchase
the stock of defendant company, which Plaintiff and defendant pur-
chased pursuant to the terms of the contract entered into between them
and that said contract, inasmuch as it is the obligation of the
corporation to know the knowledge of the contract and all of its stockholders,
except William J. Jones, who paid only one share of stock and who had
no vote of the contract and voted no objection to it, actually
bound the contract and the corporation was bound and accepted its
obligation during the entire period covered by it. The defendant now
holds to have ratified the contract and to have accepted it.
The question is the power of the President and whether to release
it in the behalf; that he tendered the stock to defendant and the

manded payment for same within a reasonable time after the termination of his employment; and that he was ready, willing and able to deliver the stock to defendant within ten days after the expiration of the contract upon defendant's payment to him of the agreed price of the stock.

It is idle to urge that the second contract was not binding upon defendant because its president and secretary were not expressly authorized by its board of directors to execute it for the company. The stock was sold to plaintiff under his first contract with the company, executed in its behalf by the same officers, whose authority to do so was not questioned but was recognized and acknowledged. The contract in question covering plaintiff's second year's employment was signed by the owners of all of the company's stock, except one share which was held, apparently nominally, by the president's son. The president and secretary were two of the three directors of the company. It was a close corporation, the affairs and destinies of which were in the complete control of its president, Thomas J. Kane, and to say that the company might accept the benefits of the contract and repudiate its obligations upon any such flimsy technicality as that urged here would be, to say the least, unconscionable.

The consideration that influenced all of the relations of the parties to this cause was that it would be mutually beneficial to them if plaintiff had an interest in the company while he was in its employ, the idea being, of course, that his ownership of stock in the company would spur him on to greater efforts that would inure to his as well as the company's benefit. We are of the opinion that the defendant was clearly bound to purchase plaintiff's stock at the termination of his employment under the second contract.

As to defendant's contention that plaintiff failed to tender his stock for repurchase within ten days after the expiration

of the contract and thereby released defendant of its obligation to pay for same, we seriously doubt the legal necessity of making such tender within the ten days mentioned therein, so long as the tender was made within a reasonable time, as it admittedly was. In any event, plaintiff testified that he offered the stock to defendant and demanded payment for same within ten days, and, while there was a sharp conflict in the evidence on this point, the trial judge saw and heard the witnesses and resolved this question in plaintiff's favor. After a careful examination of all of the evidence in the record we are not prepared to say that the finding of the trial court was against the manifest weight of the evidence.

For the reasons indicated herein the judgment of the Municipal court is affirmed.

AFFIRMED.

Gridley, P. J., and Scanlan, J., concur.

of the contract and that by payment of the bill of exchange to pay for same, he actually made the legal necessity of making such contract with the payee of the bill of exchange, as long as the tender was made within a reasonable time, as it is admitted that in any event, plaintiff testified that he offered the check to defendant and demanded payment for same within ten days, and while there was a sharp conflict in the evidence on this point, the trial judge did not believe the evidence and awarded this question in plaintiff's favor. From a correct consideration of all of the evidence in the record we are not convinced by any fact that the finding of the trial court was against the manifest weight of the evidence.

For the reasons indicated herein the judgment of the

municipal court is affirmed.

APPROVED.

WILLIAM F. J. and GEORGE J. ...

5876

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and thirty-four,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

278 I.A. 630⁴

BE IT REMEMBERED, that afterwards, to-wit: On

NOV 30 1934 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

IN THE APPELLATE COURT OF ILLINOIS
SOUTHERN DISTRICT.

October Term, A. D. 1934.

PEOPLE OF THE STATE OF ILLINOIS,
By Edwin V. Champion, State's
Attorney and HENRY A. MILLER,
Appellees,

Appeal from
Circuit Court,
Peoria County.

vs.

Herald Reichel,
Appellant.

COINE ** P. J.

This is an appeal by Herald Reichel from an order of the circuit court of Peoria county in which the State's Attorney filed a quo warranto proceeding to determine the rights of Henry A. Miller and Herald Reichel as claimants to the office of supervisor of the Town of Peoria in the County of Peoria, State of Illinois.

Appellant does not set out the errors relied upon for reversal. The present Practice Act in force in this State does not require an assignment of errors to be attached to the record and printed in the abstract. Nor did the Practice Act of 1907 contain any provisions requiring an assignment of errors to be attached to the record and printed in the abstract. This was then required by rule 11 of the Supreme Court and by rule 13 of this court. Under rule 23 of the schedule of rules as set out in the present Practice Act, it is provided that the appellant shall file a printed brief which shall among other things contain, "the errors relied upon for a reversal." This rule may be said to be superseded by rule 39 of the Supreme Court, and by rule 9 of this court, which both provide that the brief of the appellant shall contain, "the errors relied upon for a reversal." Courts of review have inherent power to institute and prescribe rules of practice and such rules when established have the force of law and are obligatory upon the

[illegible]

court as well as upon the parties. There is no attempt made by the appellant to set out in his brief the errors relied upon for a reversal. In the case of *Burrill vs. The American Telephone Co.*, 217 Ill., 189, the court says: "The abstract fails to show any assignment of errors and upon an examination of the record itself, we are unable to find any errors assigned. The assignment of errors stand in the place of the declaration in a suit at law, or the bill itself in a chancery proceeding." In the case of *Georgia vs. E. E. & G. RR.CO.*, 237 Ill., 93, the court, in discussing the necessity of an assignment of errors on appeal, use this language: "The abstract fails to show any assignment of errors and upon examination of the record we are unable to find any assigned thereon. Assignment of errors upon the record stands as pleadings in this court and is necessary, and, if the case has been submitted for final decision without the assignment of errors upon the record, the appeal will be dismissed."

Since there is no statement in the record in this case of the errors relied upon for reversal the appeal must necessarily be dismissed.

Appeal dismissed.

Dave J. Dissenting:

Rule Nine of this Court, adopted June 25, 1934, provides that the brief of appellant shall contain a short and clear statement of the case, showing the nature of the action and of the pleadings sufficient to show what the issues were, the leading facts, how the issues were decided, what the judgment or decrees was, together with the errors relied upon for reversal. This rule is substantially the same as our former Rule No. 17, (235 Ill. App. 31.). Rule 11 of the Supreme Court and its former Rule 15, (119 Ill.16) are the same.

Under the Practice Act of 1907, Rule 12 of this Court

(235 Ill. App.XXIII) provided that the appellant shall in all cases assign errors at the time of filing the record, which must be written upon or attached to the record, and on failing so to do, the cause may be dismissed. Rule 11 of the Supreme Court (319 Ill. 14) under the Practice Act of 1907, contained the same provisions and, as stated in the majority opinion, it was frequently held that a failure to comply with these rules, necessitated a dismissal of the appeal.

Such an assignment of errors, as was formerly necessary, is no longer required under our rules or under the present Practice Act, and while the provisions of our present Rule Nine should be substantially followed by counsel in presenting a case to this court, an examination of counsel's brief in the instant case discloses, that while it is not a model which this court would commend to the profession to be followed, still it is not so insufficient as, in my opinion, requires a dismissal of this appeal.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court



54

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. ELAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 631'

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 10 1935 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

May Term, A. D. 1934.

Johnson Oil Refining Company,

Plaintiff in error,

vs.

Error to the Circuit Court

of Iroquois County

Ellis F. Burt and Anna Burt,

Defendants in error,

WOLFE - P. J.

On October 22, 1932, the Johnson Oil Refining Company filed its declaration in an action of debt against Ellis F. Burt and Anna Burt. It charges that Ellis F. Burt breached the condition of a bond which required him, as principal, to faithfully account to the plaintiff for ^{all} money, merchandise and property for which he is accountable or chargeable under the terms of his written agreement with the plaintiff, dated June 12, 1929. The bond is in the penal sum of \$2,000.00, and the liability of Anna Burt, the mother of Ellis, rests upon the obligation assumed by her as surety on the bond. On or before June 12, 1929, Ellis F. Burt was an agent of the plaintiff selling its goods, and on that date he had in his possession for sale products of the plaintiff for which he was accountable. The written agreement was a continuation of that agency. By the terms of the bond the written agreement is made a part of the bond and the declaration does not charge any breach of the bond prior to June 12, 1929.

Pleas were filed denying that Ellis F. Burt has failed to faithfully account for all money, merchandise, and property intrusted to him by the plaintiff and for which he is accountable, or chargeable to the plaintiff as alleged in the declaration.

In the trial court there was a verdict and judgment for the defendants. The plaintiff's motion for a new trial on the grounds that

In the Appellate Court of Illinois

Second District

May Term, A. D. 1934.

Johnson Oil Refining Company,

Plaintiff in error,

vs.

of McDonough County

Ellis T. Burt and Anna Burt,

Defendants in error,

WOLFE - P. 1.

On October 22, 1932, the Johnson Oil Refining Company filed its declaration in an action of debt against Ellis T. Burt and Anna Burt. It charges that Ellis T. Burt procured the condition of a bond which required him, as principal, to faithfully account to the plaintiff for money, merchandise and property for which he is accountable or chargeable under the terms of his written agreement with the plaintiff, dated June 11, 1932. The bond is in the penal sum of \$2,000.00, and the liability of Anna Burt, the mother of Ellis, rests upon the obligation assumed by her as surety on the bond. On or before June 11, 1932, Ellis T. Burt was an agent of the plaintiff selling its goods, and on that date he used in his possession for sale products of the plaintiff for which he was accountable. The written agreement was a continuation of that agency. By the terms of the bond the written agreement is made a part of the bond and the plaintiff does not charge any breach of the bond prior to June 12, 1932. Please were filed denying that Ellis T. Burt had failed to faithfully account for all money, merchandise, and property introduced to him by the plaintiff and for which he is accountable, or chargeable to the plaintiff as alleged in the declaration. In the trial court there was a verdict and judgment for the defendants. The plaintiff's motion for a new trial on the grounds that

the verdict is contrary to law and the evidence in the case; that the trial court admitted incompetent evidence on behalf of the defendants; that the court gave improper instruction for the defendants; and that the attorney for the defendants made prejudicial statements against the plaintiff in his argument to the jury was overruled. The grounds stated in the motion are assigned as errors in this court by the plaintiff.

Whether Ellis F. Burt has failed to faithfully account to the plaintiff for its merchandise received by him as provided by his written agreement since the execution of the bond; also, whether or not the evidence shows that there was a shortage in the accounts of Ellis F. Burt with the plaintiff before the bond was signed, are disputed questions. It is contended by defendants that there was such a shortage on June 12, 1929, and the contract of Burt's agency being a continuing one, the plaintiff has failed to prove that any shortage existed between June 12, 1929 and April 6, 1932, when the agency was terminated. The plaintiff does not reply to this contention of the defendants by a full or convincing discussion of the facts appearing in evidence.

The plaintiff sells its products consisting of gasoline, kerosene, oils, and grease by distributing agents who are placed in charge of the plaintiff's bulk stations, or distributing warehouses in localities where such products are sold by their agents to the public. From June 18, 1928 to June 12, 1929, Ellis F. Burt was in the employ of the plaintiff under some form of employment which does not appear in the evidence, but presumably as a distributing agent at Rankin, Illinois. The audit of the amounts of the invoices of products shipped to Burt by the plaintiff and received by him, the payments made by Burt for these products, the inventory showing the products in the bulk and filling stations, the amounts of money in Burt's hand belonging to the plaintiff which he had received for such

the verdict is contrary to law and the evidence in the case; that the trial court admitted incompetent evidence on behalf of the defendants; that the court gave improper instructions for the defendants; and that the attorney for the defendants made prejudicial statements against the plaintiff in his argument to the jury was overruled. The grounds stated in the motion are sustained as errors in this court by the

plaintiff.

Whether Willis E. Hurt has failed to faithfully account to the plaintiff for its merchandise received by him as provided by his written agreement since the execution of the bond; also, whether or not the evidence shows that there was a shortage in the accounts of Willis E. Hurt with the plaintiff before the bond was signed, are disputed questions. It is contended by defendants that there was such a shortage on June 12, 1932, and the contract of Hurt's agency being a continuing one, the plaintiff has failed to prove that any shortage existed between June 12, 1932 and April 6, 1933, when the agency was terminated. The plaintiff does not reply to this contention of the defendants by a full or convincing discussion of the facts appearing in evidence.

The plaintiff sells its products consisting of gasoline, kerosene, oil, and grease by distributing agents who are placed in charge of the plaintiff's filling stations, or distributing warehouses in localities where such products are sold by their agents to the public. From June 12, 1932 to June 12, 1933, Willis E. Hurt was in the employ of the plaintiff under some form of employment which does not appear in the evidence, but presumably as a distributing agent at Rankin, Illinois. The sale of the amounts of the invoice of products shipped to Hurt by the plaintiff and received by him, the payments made by Hurt for these products, the inventory shown in the products in the bulk and filling stations, the amounts of money in Hurt's hand belonging to the plaintiff which he had received for such

products sold, the commissions due Burt, and other debits and credits between these two parties would show the amount or balance due the plaintiff or Burt on June 12, 1929. On final settlement, that is on the termination of Burt's employment, there should be deducted from the price of the products shipped to him the freight charges on unsold products still in his possession as such agent.

On June 12, 1929, H. R. Hartley, then the plaintiff's division manager of its district in which Rankin is located, and Ellis F. Burt made what is called a "checking in audit" before the agreement and bond were signed to show the state of the accounts between the plaintiff and Burt. This audit consists of eight pages and it appears in evidence as plaintiff's exhibit two. Hartley had with him at that time a statement furnished by the general office of the plaintiff, dated May 15, 1929, which listed items of products shipped to Burt by the plaintiff from March 22, to May 10, 1929, inclusive, for which Burt had not paid the plaintiff in full by May 15, 1929. Other items of products shipped to Burt by the plaintiff were also on the statement furnished by the general office of plaintiff or were written on the statement by Hartley while making the audit. In other words, the completed list showed the products, and the prices thereof for which Burt was to account since his last payment to the plaintiff on May 13, 1929, and which products were received by Burt up to June 12, 1929. The items on the completed list were checked when the audit was made by Hartley and Burt against the invoices held by Burt for these products.

Hartley, for the purpose of the audit, obtained a statement from the Rankin-Whitman State Bank of the checking account in the name of the plaintiff which, with the deposits made by Burt on June 12, 1929, showed the balance in the bank on that date. This

products sold, the commissions for Burt, and other debts and credits between these two parties would show the amount or balance due the plaintiff or Burt on June 12, 1939. On final settlement, that is on the termination of Burt's employment, there should be deducted from the price of the products shipped to him the plaintiff's charges on unsold products still in his possession as such agent.

On June 12, 1939, H. L. Hartley, then the plaintiff's division manager of its district in which Burtin is located, and Ellis F. Burt made what is called a "checking in audit" before the agreement and bond were signed to show the state of the accounts between the plaintiff and Burt. This audit consists of eight pages and it appears in evidence as plaintiff's exhibit two. Hartley had with him at that time a statement furnished by the general office of the plaintiff, dated May 15, 1939, which listed items of products shipped to Burt by the plaintiff from March 28, to May 10, 1939, inclusive, for which Burt had not paid the plaintiff in full by May 15, 1939. Other items of products shipped to Burt by the plaintiff were also on the statement furnished by the general office of plaintiff or were written on the statement by Hartley while making the audit. In other words, the completed list showed the products, and the prices thereof for which Burt was to account since his last payment to the plaintiff on May 13, 1939, and which products were received by Burt up to June 1, 1939. The items on the completed list were checked when the audit was made by Hartley and Burt against the invoices held by Burt for these products.

Hartley, for the purpose of the audit, obtained a statement from the Hamilton-Whitman State Bank of the checking account in the name of the plaintiff which, with the deposits made by Burt on June 12, 1939, showed the balance in the bank on that date. This

amount represented the money received by Burt for sales of plaintiff's products as their agent, less the total amount of checks he had drawn on the account in payment to the plaintiff for such products and his commissions for such sales. This bank statement appears as page five of said exhibit two.

Attached to the bank statement was a check, dated May 31, 1929, drawn against the bank account of plaintiff by Burt, payable to plaintiff for the sum of \$2057.99. This check was paid from the bank account through Chicago Clearing House, on June 1, 1929. This check paid for products shipped to Burt by plaintiff on March 22, March 30 and April 4, 1929, but not in full for products shipped to him from March 22 to June 12, 1929. This bank statement is page 4 of plaintiff's exhibit two. On page three of the exhibit Burt is given credit for this payment of \$2057.99, and according to said page three Burt was accountable to the plaintiff for products received by him in the sum of \$5368.97 to June 12, 1929, and, unpaid for by him.

Hartley and Burt on June 12, 1929, also prepared inventories showing the unsold products which were in the bulk and filling stations at Rankin. These inventories appear as pages six, seven and eight of said exhibit two. The inventories of the bulk and filling stations show that Burt had on hand products belonging to the plaintiff to the amount of \$3783.04. The bank statement shows that on June 12, 1929, there was in the bank in plaintiff's name the sum of \$1367.96.

Hartley also had with him when the audit was made a printed blank of two pages furnished by the plaintiff and designated in print thereon, "Audit of Class 'B' Distributing Station." This blank is pages one and two of said exhibit two. The other pages of the exhibit were on separate pieces of paper and Hartley pinned them to the blank after the audit was finally completed by carrying

amount represented the money received by Burt for sales of plaintiff's products as their own, less a small amount of checks he had drawn on the account in payment to the plaintiff for such products and his commissions for such sales. This bank statement appears as page five of said exhibit two.

Attached to the bank statement was a check, dated May 31, 1939, drawn against the bank account of plaintiff by Burt, payable to plaintiff for the sum of \$2037.99. This check was paid from the bank account through Chicago Clearing House, on June 1, 1939. This check paid for products shipped to Burt by plaintiff on March 23, March 30 and April 4, 1939, but not in full for products shipped to him from March 23 to June 18, 1939. This bank statement is page 4 of plaintiff's exhibit two. On same page of the exhibit Burt is given credit for this payment of \$2037.99, and according to said page three Burt was accountable to the plaintiff for products received by him in the sum of \$2038.97 to June 1, 1939, and, payable for by him.

Hartley and Burt on June 12, 1939, also prepared inventory list showing the unsold products which were in the bulk and filling stations at Berlin. These inventories appear as pages six, seven and eight of said exhibit two. The inventories of the bulk and filling stations show that Burt had on hand products belonging to the plaintiff to the amount of \$8783.04. The bank statement shows that on June 1, 1939, there was in the bank in plaintiff's name the sum of \$1787.99.

Burt also had with him when the audit was made a printed blank of two pages furnished by the plaintiff and contained in printed version, Audit of Case 'N' Distributing Station. This blank is pages one and two of said exhibit two. The other pages of the exhibit were on separate pieces of paper and Hartley pinned them to the blank after the audit was finally completed by carrying

over the totals from pages three to eight inclusive and placing them in the proper spaces on pages one and two.

On page two of the exhibit Burt is given credit for uncollected accounts to the amount of \$122.30, also the \$1367.96 in the bank. On page one Burt is given credit for \$90 unsold coupon books, and a further credit of \$6.85 for sales of June 6, 1929, but cash therefor not collected. Page one is a recapitulation of the other pages of the audit and it shows in summary form total products received by Burt to the amount of \$5368.97, money in bank, total of inventories, and other credits as above indicated amounting in all to the total sum of \$5369.97. Thus leaving a balance due Burt of 98¢ as his commission still in the bank.

Page two of exhibit two is signed as follows: "Approved: H. R. Hartley, Auditor". "Accepted: Ellis Burt, Local Manager." Page two, as above pointed out, being a part of the printed blank furnished its auditors by the plaintiff. Furthermore, on June 21, 1929, Burt sent to the plaintiff a check for \$1238.04 drawn on plaintiff's bank account at Rankin, thus further acknowledging the correctness of the audit.

The audit prepared by Hartley and Burt is the only evidence appearing in the record showing the amount of products in the bulk and filling stations, and the amount of money in the bank on June 12, 1929. This audit is not contradicted by evidence nor is it disputed by the defendants. No cross errors are assigned that the trial court erred in admitting the audit in evidence. However, the defendants contend that the evidence shows that there was a deficit in Burt's accounts with the plaintiff on June 12, 1929, to the amount of \$4060.32, for which the surety, Anna F. Burt, is not liable.

This contention of the defendants arises out of the following circumstances. The plaintiff filed with its declaration a bill of particulars which shows all of the debits and credits of Burt as plaintiff's agent from June 18, 1928 to April 6, 1932, when the

over the totals from the three to eight inclusive and listing them in the proper places on pages one and two.

On page two of the exhibit there is given credit for an-

collected accounts to the amount of \$12.00, also the \$1387.32 in the bank. On page one there is given credit for \$30 unsold coupon books,

and a further credit of \$8.55 for sales of June 8, 1929, but each

therefor not collected. There is also a recalculation of the plain-

pages of the audit and it shows in summary form total products receiv-

ed by Hurt to the amount of \$500.00, money in bank, total of inven-

tories, and other credits as above indicated amounting to all the

total sum of \$500.00. Thus leaving a balance due Hurt of \$94.32

his commission still in the bank.

Page two of exhibit two is also as follows: "Approved:

H. R. Hartley, Auditor." "Accepted: This part, Local Manager."

Page two, as above pointed out, being a part of the printed blank

turned the auditors by the plaintiff. Furthermore, on June 21,

1929, Hurt sent to the plaintiff a check for \$1238.04 drawn on plain-

the bank account at Rankin, thus further acknowledging the correct-

ness of the audit.

The audit prepared by Hartley and Hurt is the only evidence

submitted in the record showing the amount of products in the bulk

and filling stations, and the amount of money in the bank on June 19,

1929. This audit is not contradicted by evidence nor is it disputed

by the defendants. No cross-examination was assigned to the trial court

erred in admitting the audit in evidence. However, the defendants con-

ced that the evidence shows that there was a deficit in Hurt's

accounts with the plaintiff on June 12, 1929, to the amount of

\$4080.32, for which the surety, and Hurt, is not liable.

This contention of the defendants arises out of the follow-

ing circumstances. The plaintiff filed with its declaration a bill of

particulars which shows all of the debts and credits of Hurt as

plaintiff's agent from June 18, 1928 to April 6, 1929, when the

final or check out audit of Burt's accounts was made. Confining their attention to the items of the bill of particulars from June 18, 1928 to June 12, 1929, the defendants state that the total debits for that period amounts to \$26001.74; the total credits amount to \$21941.42; thus leaving a deficit of \$4060.32 on June 12, 1929, the date when the bond was signed. The bill of particulars was admitted in evidence by agreement of the parties to obviate the necessity of introducing the large number of all the invoices, checks and statements showing how much merchandise Burt had received from the plaintiff from June 18, 1928 to April 6, 1932 and the amounts paid by Burt for that merchandise. It was also stipulated by the parties that the invoices, checks and statements if introduced in evidence would correspond with the items of debits and credits shown in the bill of particulars. The bill of particulars is the evidence relied upon by the defendants to show that Burt was in arrears of \$4060.32 on June 12, 1929.

It requires no argument to demonstrate that the alleged shortage of \$4060.32 appearing solely from the bill of particulars, must be balanced against the amount of money in the bank on June 12, 1929, less, as will hereafter be explained, the check for \$1238.04 sent in to plaintiff by Burt on June 12, 1929; the amount of products in the bulk and filling stations; and such other credits to which Burt was entitled on that date as shown by the audit. If this is done (it is the only evidence in the case and uncontradicted and undenied) there was due from Burt to the plaintiff as their agent the sum of \$71.41, on current audit to be adjusted as freight on final audit. The amount of the check of \$1238.04 must be deducted from the amount in the bank for the reason that the defendants have added that amount in the credits given Burt in the bill of particulars. It may be also added that on page one of plaintiff's exhibit two there appears the \$1238.04 but it is no way taken into account in

final or check on credit of the defendant was made. Continuing their attention to the item of the bill of merchandise from June 18, 1928 to June 1, 1929, the defendant states that the total debit for that period amounts to \$8401.74; the total credit amount to \$21941.44; thus leaving a deficit of \$13539.70 on June 1, 1929, the date when the bank was closed. The bill of merchandise was admitted in evidence by agreement of the parties to obviate the necessity of introducing the large number of all the invoices, checks and statements showing how much merchandise had been received from the plaintiff from June 1, 1928 to April 1, 1929 and the amounts paid by that time that merchandise. It was also stipulated by the parties that the invoices, checks and statements introduced in evidence would correspond with the item of debit and credit shown in the bill of merchandise. The bill of merchandise is the evidence relied upon by the defendant to show that there was an amount of \$13539.70 on June 1, 1929.

It requires no argument to demonstrate that the alleged shortage of \$13539.70 appearing solely from the bill of merchandise, must be balanced against the amount of money in the bank on June 1, 1929, less, as will hereafter be explained, the check for \$1388.04 sent in to plaintiff by him on June 1, 1929; the amount of products in the bulk and filling stations; and all other credits to which there was entitled on that date as shown by the audit. If this is done (it is the only evidence in the case and uncontested and uncontroverted) there was due from him to the plaintiff as their agent the sum of \$71.41, or current audit to be adjusted as freight on final audit. The amount of the check of \$1388.04 must be deducted from the amount in the bank for the reason that the defendant has added that amount in the credits given him in the bill of merchandise. It may be also noted that on page one of plaintiff's exhibit two there appears the \$1388.04 but it is not taken into account in

striking the balance due Burt in the audit. These figures being on the audit has caused some comments to be made in the case. Two figures referred to were no doubt placed on the audit for the guidance of the plaintiff's auditors when making later audits of Burt's accounts. To us there is no mystery connected with these figures being on the audit.

It appears in evidence that after June 12, 1929, that the accounts of the plaintiff and Burt were audited about every four weeks until April 6, 1932, when the final or "check out" audit was made by Burt and F. G. Collister, successor to Hartley as plaintiff's division manager. This audit, of course, was made after the execution of the written agreement and the bond. This written agreement appointed Burt distributing agent for the plaintiff and he was placed in charge of the bulk and filling stations which were in his custody prior to June 12, 1929. The agreement provides that Burt deposit all the money received by him as distributing agent in a bank designated by the plaintiff and that he pay the plaintiff for produce shipped to him by the plaintiff by checks drawn by Burt in favor of the plaintiff on the bank account. The plaintiff fixed the retail prices of the products sold by Burt, and he received a commission on the amount of merchandise sold by him and which commissions he was permitted to withdraw from the bank accounts by checks written by him. All sales by Burt were to be paid for cash on delivery. The agreement provides that Burt is to reimburse the plaintiff for any loss or shortage of merchandise delivered to him as distributing agent due to any cause except fire. Clearly, the method of auditing the accounts between Burt and the plaintiff would be the same as that ~~the accounts between Burt and the plaintiff would be the same as that~~ followed by Hartley and Burt when they made the audit of June 12, 1929.

Such an audit was made by Collister and Burt on April 6, 1932, and it shows Burt "short" \$1148.53. Burt wrote his acceptance on the

striking the balance and that in the audit. The audit balance on the audit has caused some comments to be made in the case. The figures referred to were no doubt placed on the audit for the guidance of the plaintiff's auditor when making later audits of Burt's accounts. To us there is no mystery connected with these figures being on the audit.

It appears in evidence that after June 10, 1932, that the accounts of the plaintiff and Burt were audited about every four weeks until April 6, 1933, when the final audit was made. The audit was made by Burt and E. C. Collier, successor to Hartley as plaintiff's division manager. This audit, of course, was made after the execution of the written agreement and the bond. This written agreement provided that Burt should be Burt distributing agent for the plaintiff and he was placed in charge of the bulk and filling stations which were in his custody prior to June 12, 1932. The agreement provided that Burt should all the money received by him as distributing agent in a bank account named by the plaintiff and that he pay the plaintiff for gasoline shipped to him by the plaintiff by checks drawn by Burt in favor of the plaintiff on the bank account. The plaintiff fixed the retail prices of the gasoline sold by Burt, and he received a commission on the amount of merchandise sold by him and which would allow him to be permitted to withdraw from the bank account by check without any limit. All sales by Burt were to be paid for cash or delivery. The agreement provides that Burt is to reimburse the plaintiff for any loss or shortage of merchandise delivered to him as distributing agent due to any cause except theft. Finally, the parties to the agreement provided that the plaintiff would be the owner of the accounts between Burt and the plaintiff and that the plaintiff would be the owner of the accounts between Burt and the plaintiff.

Such an audit was made by Collier and Burt on April 6, 1933, and it shows Burt's "short" \$114.53. Burt wrote his recollection of the

inventories of the bulk and filling stations as prepared by Collister and Burt. He also wrote his acceptance on the audit allowing him a credit for freight on products which he had on hand but not sold by him. At the general office of the plaintiff, after the audit was sent in to that office, some minor changes were made in red ink on the sheet showing the credit due Burt on freight was \$25.42 instead of \$23.97.

No cross errors are assigned that the trial court erred in admitting this audit in evidence. It is the only evidence in the record showing products in the bulk and filling stations and the money in the bank on April 6, 1932. Burt did not testify that the audit is incorrect, nor does he by his testimony complain of the credits allowed him in the audit. On April 6, 1932, Burt handed to Collister a letter which is as follows:

"Rankin, Ill., 4-6-32. Johnson Oil Refining Co. Gentlemen: In regard to shortage shown in check out of today. It will take some little time to bring in accounts and checks. I will pay you in the following manner at the time stated. April 15, \$200. April 30, \$175. May 31, \$150; June 30, \$150. July 31, \$150. August 31, \$150. And balance due the following month. Very truly yours, (signed) E. Burt." This letter Collister sent to the plaintiff. The checks mentioned in this letter no doubt referred to checks Burt had accepted from his customers as plaintiff's distributing agents and which checks he offered to Collister on April 6, 1932, and which Collister refused to accept. The accounts mentioned in the letter were undoubtedly amounts due Burt from customers who had bought plaintiff's products from Burt on credit.

The only evidence in the record showing all the debits and the credits of Burt as the agent of the plaintiff is contained in the bill of particulars which lists all the products shipped to Burt and payments made by Burt for these products from June 18, 1928 to April 6, 1932. In the bill of particulars Burt is allowed a credit

inventory of the Bill and Miller Station as provided by Collier and Burt. He also wrote his statement on the audit showing him a credit for freight on products which he had on hand but not sold by him. At the General Office of the plaintiff, after the audit was sent in to that office, some minor changes were made in red ink on the sheet showing the credit due Burt on freight was \$23.42 instead of \$23.97.

It is cross-examined and assigned to the trial court to determine whether this audit is evidence. It is the only evidence in the record showing products in the Bill and Miller Station and the money in the bank on April 6, 1932. It is not fairly that the audit is incorrect, not even as by the testimony of Collier or the products which he had in the audit. On April 6, 1932, Burt handed to Collier a letter which is as follows:

Warren, Ill., 4-6-32. Johnson Oil Company Co. Gentlemen: In regard to storage shown in each of my letters. It will take some little time to bring in accounts and books. I will pay you in the following manner at the time stated. April 15, 1932. April 30, 1932. May 15, 1932. June 30, 1932. July 15, 1932. August 31, 1932. And balance due the following month. Very truly yours, (signed) Burt. This letter Collier sent to the plaintiff. The check mentioned in this letter no doubt is added to checks sent and accepted from his customers as plaintiff's distributing agents and which checks he offered to Collier on April 6, 1932, and which Collier refused to accept. The accounts mentioned in the letter were undoubtedly known to Burt from customers who had bought plaintiff's products from him on credit.

The only evidence in the record showing all the debits and the credits of Burt as the agent of the plaintiff is contained in the bill of particulars which lists all the products shipped to Burt and payments made by Burt for these products from June 18, 1932 to April 6, 1932. In the bill of particulars Burt is allowed a credit

to the amount of \$200 on April 20, 1932, which was paid by Burt by a check on his own account in compliance with his letter of April 6, 1932. Burt is also given credit on the bill of particulars for freight to the amount of \$25.48. It is not contended that Burt has made any other payments to plaintiff.

The bill of particulars shows debits to the amount of \$100161.33; credits to the amount of \$93967.74. This leaves the amount at \$6193.51 for which Burt is to account, by money in the bank, inventories and other credits allowed him on final audit. The bill further shows that on final settlement Burt was allowed credits, as shown by the final audit, for money in the bank, merchandise of plaintiff in the bulk and filling stations, and other items of credit not disputed, to the total amount of \$5125.29, leaving a shortage by Burt of \$998.30.

Burt introduced in evidence an audit made by him and Collister on March 10, 1932, which shows that on that date Burt was short \$314.64. That Burt has not paid this shortage together with all the products received by him since that date, after allowing him credits as shown by the bill of particulars, and the amount of money in the bank on April 6, 1932, together with an adjustment of the merchandise in the bulk and filling stations on March 10, 1932, and April 6, 1932, is clear to this court.

It is further contended by the defendants that the plaintiff has not proved by a preponderance of the evidence that Ellis F. Burt is indebted to the plaintiff because Collister and the witness, O. H. Crawford, the head bookkeeper for the plaintiff, were unable on cross examination to point out whether Burt was short gasoline, kerosene, furnace oil or grease. Crawford testified: "If a sale is made, (by a distributing agent) there is no report to the general office and for that reason it would be impossible to tell what particular item was not accounted for. It is his place to either

to the amount of \$200.00 on April 20, 1932, which was paid by bank by a check on his own account in compliance with his letter of April 6, 1932. But he has given credit on the bill of particulars for that to the amount of \$2.44. It is not contended that But has made any other payment to plaintiff.

The bill of particulars shows liability to the amount of \$1001.30; credit to the amount of \$1007.74. This leaves the amount at \$613.56 for which But is so account, by money in the bank, inventories and other credit allowances on final audit. The bill further shows that on final settlement But was allowed credits, as shown by the final audit, for money in the bank, inventories and other items of plaintiff in the bill and billing, to the total amount of \$1132.32, leaving a credit not claimed, to the total amount of \$613.56, leaving a shortage by But of \$622.30.

But introduced in evidence an audit made by him and Colliester on March 10, 1932, which shows that on that date But was short \$314.84. That But has not paid this shortage together with all the shortages received by him since that date, after allowing him credit as shown by the bill of particulars, and the amount of money in the bank on April 6, 1932, together with an adjustment of the merchandise in the bill and billing statement on March 10, 1932, and April 6, 1932, is closer to this court.

It is further contended by the defendant that the plaintiff has not proved by a preponderance of the evidence that Willie But is indebted to the plaintiff because Colliester and the witness, J. H. Gray, the only bookkeeper for the plaintiff, were unable to cross examination to point out where But was short gasoline, kerosene, and oil or grease. Gray testified: "It is a safe to make, (of a distribution sheet) there is no report to the general office and on that record it would be impossible to tell what particular item was not accounted for. It is his place to either

have the merchandise or have cash in the bank to cover charges for merchandise which we have shipped to him."

Anna F. Burt did not testify. When Collister made demand on her for the amount of Burt's shortage shown by the audit of April 3, 1932, she replied by stating that she did not have the money to pay it.

It is assigned as error that the trial court improperly admitted in evidence on the part of the defendants, a lease between Joseph Zobrist, Burt's successor, as distributing agent, appointing Burt with the plaintiff's consent, a sub-agent in charge of one of plaintiff's filling stations in Rankin. Plaintiff cancelled this lease July 22, 1932. The lease was not competent evidence in the case. The bond provides that any forbearance toward the agent on the part of the plaintiff shall not in any wise release or exonerate in whole or in part the surety in respect to surety's liability under the bond.

If the case is re-tried, the other alleged errors complained of by the plaintiff, will not be repeated in view of what is said in this decision. We are of the opinion that the jury arrived at their verdict under a miscomprehension of the evidence and that the verdict is clearly contrary to the evidence in the case.

We cannot say that the case was well presented in this court, and the task of stating the relationship of the parties and going over the various audits and accounts has been very laborious. We will state further that the rules of this court require that the index to the abstract of the record must give not only the number of each exhibit and document in evidence, but must also name and describe it by character, parties, date, etc., in order to distinguish it from every other exhibit or document in the record.

The judgment of the trial court is reversed and the case is remanded to that court for a new trial.

Reversed and remanded for new trial.

have the responsibility or have cash in the bank to cover charges for merchandise which we have shipped to him."

ANNA: That is not correct. When Colliester was coming on her for the amount of \$100.00, she was by the end of April 6, 1937, she replied by stating that she did not have the money to pay it.

It is claimed as error that the trial court improperly admitted in evidence on the part of the defendant, a letter between Joseph Toxtat, Toxtat's successor, as distributing agent, concerning Toxtat with the plaintiff's counsel, a copy of one of the plaintiff's killing station in which plaintiff admitted this letter July 1, 1937. The letter was not competent evidence in the case. The record provides that any reference toward the court on the part of the plaintiff shall not in any wise release or exonerate in whole or in part the state in respect to another's liability under the bond.

In the case is re-visited, the other alleged errors complained of by the plaintiff, will not be repeated in view of what is said in this decision. We are of the opinion that the jury arrived at their verdict under a misapprehension of the evidence and that the verdict is clearly contrary to the evidence in the case. We cannot say that the case was well presented in this court.

and the fact of stating the relationship of the parties and going over the various exhibits and documents has been very important. We will state further that the record this court requires that the index to the abstract of the record must give not only the number of each exhibit and document in evidence, but must also name and describe it by character, date, etc., in order to distinguish it from every other exhibit or document in the record. The judgment of the trial court is reversed and the case is remanded to that court for a new trial.

Reversed and remanded for new trial.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 631²

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 10 1935

the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1934

Anna Domeyer, John H. McCormick,
Trustee, John G. Schwenk, H. G.
Hoover, E. F. Gaslow, T. A. Con-
boy, Charlotta M. Morris, Mary
Dunkelman and Sophie Jacobs,
Plaintiffs (Appellees)

vs.

William L. O'Connell, Receiver of
First Trust and Savings Bank of
Sterling, Illinois,
Appellant,

Appeal from the
Circuit Court of
Lee County

Carolina M. Stadeble, Nettie Hinrichs,
The First Trust and Savings Bank as
Trustee for the Estate of Elizabeth
Walzer, dec'd,
(Appellees,
and Joe Reaver,
Defendants.

WOLFE - P. J.

On March 1st, 1920, Dora Wetzel and John Wetzel, of Sterling, Illinois, executed and delivered to the First Trust and Savings Bank of Sterling, Illinois, 32 promissory notes aggregating \$35,000.00. Each of said notes were made payable to the order of the First Trust and Savings Bank of Sterling, Illinois. At the time of the execution and delivery of the notes in question the Wetzels executed and delivered to the First Trust and Savings Bank of Sterling, their mortgage covering certain lands in Lee County, Illinois. With the exception of \$6,000. worth of said notes all were sold to different parties for a valuable consideration. The notes were all endorsed by the bank without recourse. After the sale of the notes the bank failed and William L. O'Connell was duly appointed receiver to liquidate the same.

The makers of the notes and mortgage having defaulted, Anna Domeyer, et al, on April 11, 1934, filed their bill of complaint in the Circuit Court of Lee County, Illinois, to foreclose the mortgage.

In the Appellate Court of Illinois

Second District

October Term, A. D. 1904

Anna Domeyer, John H. McCorison,
Trustees, John A. McCorison, H. E.
Hoover, H. E. Hooper, T. E. Cor-
boy, Charlotte M. Corrie, Mary
Dunkelman and Sophia Jacobs,
Plaintiffs (Appellees)

vs.

Special from the
Circuit Court of
Lee County,
Illinois

William L. O'Donnell, Receiver of
First Trust and Savings Bank of
Sterling, Illinois,

Appellant;

Caroline M. O'Donnell, Nettie Hinckley,
The First Trust and Savings Bank,
Trustee for the benefit of Illinois
Walter, dec'd,
(Appellees,
and Joe Weaver,
Defendants.

WOLFE - P. 1.

On March 1st, 1900, John O'Donnell and John O'Donnell, of Sterling,
Illinois, executed and delivered to the First Trust and Savings Bank
of Sterling, Illinois, 32 promissory notes aggregating \$5,000.00.
Each of said notes were made payable to the order of the first Trust
and Savings Bank of Sterling, Illinois. At the time of the execution
and delivery of the notes in question the notes were covered and de-
livered to the First Trust and Savings Bank of Sterling, their mort-
gage covering certain lands in Lee County, Illinois. With the exec-
tion of said notes all were sold to different parties
for a valuable consideration. The notes were all endorsed by the
bank without recourse. After the sale of the notes the bank failed
and William L. O'Donnell was duly appointed receiver to liquidate
the same.

The makers of the notes and mortgages having defaulted, Anna
Domeyer, et al, on April 11, 1904, filed their bill of complaint in
the Circuit Court of Lee County, Illinois, to foreclose the mortgages.

The bill prays for a decree of foreclosure and a sale of the premises, and that the proceeds, after paying the necessary expensed of the liquidation, court costs, etc., should be applied proportionately to the payment of the notes held by all of the parties, except those held by William L. O'Connell, the receiver of said bank.

William L. O'Connell, as receiver of the First Trust and Savings Bank of Sterling, Illinois, and other defendants, filed their answer to the bill. The answer of the receiver is the only one that is material so far as this court is now concerned. The answer admits the execution of the notes and mortgage and that the makers of the notes and mortgage have defaulted and that the plaintiffs are entitled to a decree of foreclosure, but deny that the receiver should not be entitled to pro rate equally with the other holders of the notes.

The court after a hearing found that all of the material allegations in the bill of complaint are true as therein alleged and the equities of the case are with the plaintiffs and that they are entitled to a decree of foreclosure. A decree was entered in conformity with the prayer of the bill and the findings of the court.

The court orders that in default of said payments being made, the mortgaged premises should be sold. That out of the proceeds of the sale, the Master shall, after deducting expenses, pay to the note holders other than William L. O'Connell, Receiver, the sums found due them and that in case the premises shall sell for more than sufficient to pay all of said amounts then the Master in Chancery shall pay to the defendant, William L. O'Connell, Receiver as aforesaid, the sum of \$6,912.00, with interest at the legal rate thereon, or if said remainder shall be insufficient to pay said amounts in full, then he shall apply it to the extent to which it may reach in satisfaction of said amounts.

The only question argued by the appellant is whether the court

erred in finding the notes assigned by the bank, the original payee, are entitled to priority over the notes which are held by the defendant, William O'Connell, receiver of the First Trust and Savings Bank of Sterling, Illinois. In the case of People's National Bank of Monmouth vs. Johnson, 271 Ill. App. 507, the identical question now under consideration was considered by this court. In that case we reviewed many of the authorities in other jurisdictions. On page 516 in this opinion we say: "We do not find that the question presented by this record has been determined by our Supreme Court, and in the absence of a controlling decision, this court must adopt the rule which other courts of the highest respectability have adopted and followed, especially when such a rule co-incides with our conception of equity and fair dealing. This rule is that it would be inequitable to permit appellant, as assignor, to deprive appellees, who are the assignees, of any part of the purchase value of the notes which they acquired from appellant. Appellant should not therefore be permitted to share in the proceeds derived from the sale of the mortgaged property in the event such proceeds are insufficient to pay the assignees upon these notes." We re-affirm here what we said in that opinion.

Counsel for appellants argues that there is a distinction between the present case and the Monmouth Bank case because the First Trust and Savings Bank of Sterling, Illinois, is now in process of liquidation and that William L. O'Connell is appearing as receiver of the bank in this litigation. The receiver is in no better position in collecting the assets of the bank than the bank would have been had it not gone into liquidation and had been a party defendant in this suit. The receiver stands in exactly the same position in marshalling the assets of a closed bank as the bank itself would have stood if it had not gone into liquidation when there is no fraud shown in the transaction in question. In this case it is not claimed that there was any fraud in the assignment of these notes. The decree of the Circuit Court of Lee County is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

6857

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and thirty-four,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 631³

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 10 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1934

Dorothy F. Durr Schuchat,

Plaintiff, Appellant,

vs.

Appeal from the Circuit Court

Stanley F. McKee,

of Whiteside County

Defendant, Appellee.

(P. A. Whitney, Sheriff of Whiteside
County, Illinois, and First National
Bank of Morrison, Illinois
Defendants)

WOLFE - P. J.

Dorothy F. Durr Schuchat filed a bill in the circuit court of Whiteside County against Stanley F. McKee, et al, to quiet title to certain lands and for an injunction against McKee et al, to restrain them from selling the lands to satisfy a judgment. The bill in substance is as follows:-

"Dorothy F. Durr complainant, represented that she was the owner of Lot 9 in Block 13 in Arey's Addition to Rock Falls, Illinois, by virtue of a deed from Florence E. Durr, delivered to her for a valuable consideration on or about December 13, 1930; that the First National Bank of Morrison had entered a judgment by confession against Francis E. Durr and Stanley F. McKee, for \$571.20; that said bank has assigned said judgment to Stanley F. McKee, one of the defendants; that the note on which said judgment was entered recites 'that all signers of said note are principals' and that Francis E. Durr and Stanley F. McKee were the signers of said note as principals; that as a part of the consideration for the acceptance of said deed, said Francis E. Durr agreed to pay certain other judgments which he has paid and which have been satisfied; that the assignment of the judgment by the First National Bank of Morrison to Stanley F. McKee, one of the defendants

In the case of the

of the

of the

Dorothy E. Schuchert,

Plaintiff, vs.

from the State of

of Illinois

Stanley E. Moore,

Defendant.

(P. L. Whitely, Sheriff of Whiteside County, Illinois, and First National Bank of Morrison, Illinois, Intervenor-Defendants)

WILLIAM - P. J.

Dorothy E. Schuchert filed a bill in the circuit court

of Whiteside County against Stanley E. Moore, et al., to quiet title

to certain lands and for an injunction against Moore, et al., to re-

strain them from selling and leasing the lands to others. The bill

in substance is as follows:-

"Dorothy E. Schuchert, respondent, complains that she and her co-

defendants are in possession of a certain tract of land, to-wit: Lot 2

of a block in the city of Whiteside, Illinois, and that she and her

co-defendants have been in possession of said land since the year

1920, and that they have been in possession of said land since the

year 1920, and that they have been in possession of said land since the

year 1920, and that they have been in possession of said land since the

year 1920, and that they have been in possession of said land since the

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year 1920, and that they have been in possession of said land since the

year 1920, and that they have been in possession of said land since the

year 1920, and that they have been in possession of said land since the

and one of the signers of said note, was in effect the satisfaction of said judgment; that on December 10, 1930 an execution issued out of the Circuit Court in favor of the First National Bank of Morrison, and the sheriff proceeded to make a purported levy on said lot and was proposing to sell said lot on a purported non-existent judgment in favor of Stanley F. McKee against Francis E. Durr, and that such sale would cast a cloud upon the title of the same; also that the judgment of the First National Bank of Morrison should be cancelled and the title to said lot quieted in Dorothy F. Durr, free and clear of any lien on said lot on account of said bank judgment and any claim of said McKee thereunder. The bill prays that the court will enter a decree cancelling of record said judgment for \$571.20, entered June 30, 1924, in the Circuit Court, and assigned March 16, 1924, to Stanley F. McKee, to quiet the title to said Lot 9, in the complainant, and to enjoin the sheriff from selling said lot by virtue of said judgment."

All of the defendants except Stanley F. McKee, failed to answer the bill of complaint and were defaulted. The defendant McKee filed his answer in which he denies that Dorothy F. Durr was the owner of said Lot 9, and avers that the deed from Francis E. Durr to her was a mere subterfuge to enable her to file this bill, and that Francis E. Durr is the real party in interest and is indebted to defendant upon the judgment referred to and would be barred from bringing this action in his own name; admits the entry of a judgment by confession and admits the assignment. He admits that there is a statement on the note on which judgment was entered, to the effect that all signers of the note are principals, but avers that Francis E. Durr, being indebted to McKee, executed a note to him which was sold by McKee to the First National Bank; that when said note became due Francis E. Durr was unable to pay the same and it was arranged that such note should be paid by the execution and delivery of a note by Durr to the Bank, which the Bank would accept in payment of the

original note if McKee would sign as surety; that although the note as written provided that McKee and Durr were principals, it was known and understood that McKee was merely a surety and that the relationship between Francis E. Durr and this defendant was that of principal and surety; that neither Francis E. Durr nor his grantee, the complainant, should be permitted to claim that the relationship as between them was that of co-makers; that the conveyance by Francis E. Durr was a plan to avoid the payment of the judgment to McKee and that there was no consideration from Dorothy to Francis for the deed. He avers that the assigned judgment is a judgment in favor of McKee against Francis E. Durr, but that the judgment was not satisfied by the assignment; avers that it is a lien upon the real estate; avers that the complainant Dorothy, was acquainted with all the facts, and that the filing of this bill is a part of the conspiracy between Francis E. Durr and the complainant to avoid the liability of Francis and to defraud the defendant; that Francis E. Durr is insolvent.

The case was referred to a master in chancery to hear evidence and report his conclusions as to the facts and law. The master made his report and found that the defendant McKee was not a principal in making the note but was only a surety and was entitled to a lien against the property in question. The complainant filed objections to the master's report which were overruled. She also filed exceptions to the report, which were overruled by the court, and from this ruling of the court the case is brought to this court for review.

The note in question that is causing the controversy in this case is as follows:-

"\$500.00

Morrison, Illinois
Nov. 22, 1923.

Three months after date we jointly and severally promise to pay to the First National Bank of Morrison, or order, the sum of Five Hundred Dollars.

Due February 22, 1924.

Francis E. Durr, (SEAL)

Stanley F. McKee, (SEAL) "

original note if there could be any doubt; and although the note
as written provided for the note and the note itself, it was known
and understood that there was a note and that the relation-
ship between Francis E. Hunt and the defendant was that of principal
and agent; that Francis E. Hunt was the principal, the complain-
ant, should be permitted to file his complaint as a principal
and that of co-defendant; that the complaint by Francis E. Hunt
was a plan to obtain the payment of the judgment for which the
was no consideration; that Francis E. Hunt was the principal
that the defendant was a defendant in a suit of which Francis
Francis E. Hunt, but that the defendant was not a defendant of the suit in-
ment; and that it is a fact upon the record that the
complainant, Francis E. Hunt, was admitted to all the facts, and that the
filing of this bill is a part of the conspiracy between Francis E.
Hunt and the defendant to obtain the ill-gotten property and to
obtain the judgment; that Francis E. Hunt is involved.
The case was heard on a motion to dismiss to dismiss evi-
dence and report his testimony as to the facts of the case. The witness
made his report and found that the defendant was not a defendant
in making the note but was only a co-defendant to a suit
against the property in question. The complainant filed his complaint
to the master's report which was corrected. The also filed questions
to the report, which were returned by the court, and this bill
of the court the case is brought to the court for review.
The bill is brought to the court for review in this

case is as follows:-

Forfeited, Illinois
Nov. 1, 1903.

" 1903."

Three months after date of forfeiture and specially provide
to pay to the First National Bank of Chicago, the sum of
Five Hundred Dollars.

Francis E. Hunt, (Complainant)

This note is what is commonly called a judgment note, and we have not attempted to set out that part of the note as it is immaterial so far as the issues in this case are concerned. At the conclusion of the complainant's case before the master the defendant's attorney offered to prove by the defendant McKee and made the following offer: "I offer to prove by Stanley F. McKee, one of the defendants, (1) That he was buying a house from Fernandus Jacobs on a contract and sold his interest in the house to Francis Durr, who gave McKee a note for \$700.00; (2) That McKee sold this note and endorsed the same over to the First National Bank of Morrison; (3) That later, while Francis Durr was operating a restaurant in Morrison, the note came due and McKee and Durr went to the First National Bank of Morrison and arranged with the bank to give Durr further time, and as a part of the consideration for the extension Durr paid \$200.00 and executed a new note to the First National Bank of Morrison, which both McKee and Durr signed; (4) That subsequently this note was entered in judgment in the Circuit Court of Whiteside County, Illinois, on June 30, 1924, for \$571.20 and costs, which is the judgment which the complainant by her bill ^{prays} ~~seeks~~ may be cancelled so far as Lot 9 in Arey's addition to the City of Rock Falls, Illinois, is concerned; (5) That McKee talked to F.A. Van Osdol, an officer of the First National Bank of Morrison, about this with the result that McKee bought the judgment from the bank and took an assignment of the same to himself, which he then intended to hold against and collect out of Durr. (6) That it was the intention of McKee to keep the judgment alive; (7) That on November 29, 1930, W. F. Flock was handling the transaction whereby Anna E. Hogeboom, a widow, conveyed to Francis E. Durr said Lot 9, and that on December 3, 1930, Flock obtained an abstract of title to said Lot which showed said judgment and the assignment thereof from the First National Bank of Morrison to Stanley F. McKee, and also showed three other judgments: (8) That subsequently, on December 13, 1930, Francis Durr conveyed said property to Dorothy F. Durr, the complainant. (9) That at the time of said conveyance said Lot 9

1930, Francis Burr conveyed said property to Joseph A. Burr, the
showed these other judgments: (1) That subsequently, on December 1,
the First National Bank of Portland, Oregon, and also
said lot which showed said judgment and the assignment thereof from
and that on December 2, 1930, Burr obtained an abstract of title to
Anna E. Lockwood, a widow, conveyed to Francis A. Burr said lot 9,
on November 22, 1930, A. E. Lockwood was handling the transaction wherein
it was the intention of Moore to keep the judgment alive; (7) That
he then intended to hold against and collect out of said lot 9 that
from the bank and took an assignment out of the bank to himself, with
Morrison, about this with the result that Moore bought the judgment
talked to A. E. Lockwood, an officer of the First National Bank of
tion to the City of Portland, Oregon, is deposited; (8) That Moore
but by her bill of sale we are advised to have lot 9 in Burr's name
1934, for \$571.30 and note, which in the judgment with the completion
ment in the circuit court of Multnomah County, Oregon, on June 30,
and Burr signed: (4) That subsequently this note was entered in judg-
a new note to the First National Bank of Portland, which both before
of the consideration for the extension note said \$500.00 and assigned
and arranged with the bank to give said extension note, and in a sum
came due and Moore and Burr went to the First National Bank of Portland
while Francis Burr was handling a transaction in connection with the note
the same over to the First National Bank of Portland; (5) That later,
McKee a note for \$700.00; (6) That he also said that he assigned
tract and sold his interest in the house to Joseph A. Burr, and gave
ants, (1) That he was paying a house from Portland, Oregon, of a con-
the other: "I offer to prove to Joseph A. Burr, one of the de-
attorney offered to prove at the defendant's expense the following
situation of the complaint: more during the hearing the defendant's
terial as far as the hearing is concerned. I am con-
we have not attempted to say that any part of the case as it is
this note is and is commonly called a 'judgment note'.

was worth about \$1500. (10) That Stanley F. McKee referred to in this statement is one of the defendants in this case and one of the parties against whom said judgment of \$571.20 was entered. Mr. Carl E. Eldon: "I am willing to and do stipulate that if Stanley F. McKee were sworn and examined as a witness, he would testify that the facts are as just stated by Mr. Ward. I am further willing to stipulate that the statement of Mr. Ward may be considered as the testimony of Stanley F. McKee, subject however to the objection by the complainant that said testimony and each and every item thereof is incompetent, irrelevant and immaterial. I object on the ground that the same and each and every item thereof is incompetent, irrelevant, and immaterial!" Mr. Ward; "It is so stipulated."

This is all of the evidence offered by the defendant in support of his answer. The appellant seriously insists that the court erred in admitting the defense of McKee for the reason that it was not competent for him to show that he was surety on this note and not a principal. We think that the law is well settled that a co-maker of a promissory note may be shown by the evidence to be only a surety and if the note is put in judgment, the surety may have the same assigned to him without extinguishing the debt. -- Walker v. C. M. & N. R. Co. 277 Ill. 451. In the reply brief filed by the appellants they admit this to be the law, but insist that the appellee did not make out, by proper proof a case showing that he was surety only on the note, and if McKee was surety instead of a principal on the note he could not show this by oral evidence.

The complainant came into a court of equity asking for equitable relief against the defendant McKee, and in doing so she submitted her case under equitable rules and procedure. It is undisputed that McKee took a note from Durr for \$700.00 as a purchase price of the premises in question and he endorsed the note and took it to the First National Bank of Morrison, Illinois, and received \$700.00 for the note; that when the note was due Durr did not pay it, and the bank was pressing McKee for the money; that Durr paid \$200.00 and interest on the old note and

Durr and McKee signed a note for \$500.00; that judgment was taken against McKee and Durr for \$571.20; that McKee paid the amount of this judgment and took an assignment to himself, and that he has parted with the title to the premises and he is out the sum of \$571.20, which in right and justice he is entitled to be paid. We think it is proper for the defendant to prove by oral testimony that he was only surety and not a principal on the note in question. - Ward v. Stout, 32 Ill. 399. The appellant insists that even conceding that the defendant could show by oral testimony that he was only a surety on the note, that he has not made a case that shows he is a surety on the note. The burden was on McKee to prove that he was only a surety and not a principal on this note. He insists that in proving this fact it is not necessary to use the words, "that he was only a surety and not a principal on the note," but the same may be conclusively presumed by the facts and circumstances shown in the evidence that he was surety on this note.

An examination of the stipulation discloses that when the first note became due, McKee and Durr went to the First National Bank of Morrison, Illinois, and arranged with the bank to give Durr further time, and as a part of the consideration for the extension, Durr paid the bank \$200.00 and executed the new note. At the time of the execution of the new note nothing whatever was said in regard to any indebtedness that McKee owed the bank, but only Durr's indebtedness was mentioned. It seems to us that the only logical conclusion that can be drawn from the language of this stipulation is, that the bank recognized Durr as the principal debtor, and that McKee signed the note as surety only.

We find no reversible error in this case and the judgment of the Circuit Court of Whiteside County is hereby affirmed.

Affirmed.

that the witness stated a note for \$500.00; that the witness was asked
a question as to whether or not the note was a cash note, and the witness
judgment and took an oath as to his answer, and that he was asked with
the title to the question as to whether or not the note was a cash note,
that he is entitled to be heard, and that he is entitled to be heard
for the defendant to prove by oral testimony, and he can only testify
and not a principal on the note in question, and he is not a principal
359. The defendant is not a principal on the note in question, and he
show by oral testimony that he was only a principal on the note, and
he has not made a statement that he is a principal on the note, and
prison was on the note to prove that he was only a principal on the note,
principal on the note, and he is not a principal on the note, and he is not
necessarily to use the words, "that he was only a principal on the note,"
principal on the note, but the fact that he was only a principal on the note
by the facts and circumstances shown in the evidence that he was
surety on the note.

An examination of the statement discloses that the
first note became due, under the terms of the first national bank
of Harrison, Illinois, and the bank was then to give the witness
time, and as a part of the consideration for the extension, the bank
the bank \$500.00 and extended the note, and the bank of the extension
time of the note nothing was said in regard to any in-
debtedness that the bank owed the bank, but only that the bank
was national. It seems to me that the only logical conclusion
that can be drawn from the facts of this situation is, that
the bank recognized the bank as the principal debtor, and that the bank
placed the note as surety only.

It is no reversible error in this case and the judgment
of the Illinois Court of Appeals is hereby affirmed.
Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8462

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and thirty-four,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 631⁴

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 10 1935 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1934

Charles Oertley,

Defendant in error,

vs.

Error to the Circuit Court

of Peoria County

Maria L. Gruner, David Fritz,
John W. Fritz, Lena K. Bush, and
Emma Oertley,

Plaintiffs in error.

WOLFE, P. J.

Charles Oertley, the defendant in error, started suit in the circuit court of Peoria County against Maria L. Gruner, et al, on a promissory note. The note is dated March 1st, 1927, due two years after date. The makers of the note promised to pay the defendant in error the sum of \$2600.00 with interest thereon from date. The declaration of the defendant in error consisted only of the common counts with affidavit of claim.

The defendants, now plaintiffs in error, filed the general issue and a special plea setting up the fact that the note had been materially altered by inserting the figure '5' after the words "with interest at the rate" and before the words "per cent" in a blank space on the note, and claim that the note when executed the said space was left blank. With the plea the defendants filed an affidavit of meritorious defense. The plaintiff made a motion in the trial court to strike the affidavit from the files. This motion was sustained and leave granted defendant to file a new affidavit, which was done. The plaintiff made a motion to strike the amended affidavit from the files, which motion was sustained by the court and the defendants were granted leave to file another affidavit, which was done. The plaintiff again made a motion to strike this affidavit from the files and the court sustained the motion. On February 19,

In the Supreme Court of Illinois

Charles Gortley,

Respondent,

Charles Gortley,

Plaintiff in error,

vs.

Charles Gortley,

Charles Gortley, David Gortley,
John A. Gortley, and
Emma Gortley,

Defendants in error.

WORTH, P. M.

Charles Gortley, the defendant in error, pleaded guilty to the
defendant's account of Charles Gortley's account of the
promissory note. The note is dated March 1st, 1911, for two years
after date. The makers of the note promised to pay the defendant
in error the sum of \$1000.00 with interest thereon from date. The
designation of the defendant in error appearing only in the common
counts with affidavit of denial.

The defendant, now plaintiff in error, filed the second issue
and a special plea setting out the fact that the note had been error-
fully altered by inserting the words "after two years" with
intent at the date and before the words "after two years" is a return
space on the note, and claim that the note when executed the said
space was left blank. In the plea the defendant filed the follow-
ing of material facts. The plaintiff made a motion to strike the plea
and to strike the affidavit from the file. This motion was sub-
stantiated and leave granted defendant to file a new affidavit, which
was done. The plaintiff made a motion to strike the altered affid-
avit from the file, which motion was sustained by the court and the
defendants were granted leave to file another affidavit, which was
done. The plaintiff again made a motion to strike this affidavit
from the file and the court sustained the motion. On February 17,

1933, the court entered a rule against the defendants to plead instanter to the declaration. This they failed to do and they were then defaulted. On February 20, 1933, a hearing was had before the court. The note was introduced in evidence and the court found the issues in favor of the plaintiff and entered judgment for the sum of \$3941.22. From this judgment the case was brought to this court on a writ of error.

It is insisted in this court by the plaintiff in error that their amended affidavit of merits filed with the plea in the trial court stated a meritorious defense, and therefore, the trial court erred in sustaining the motion to strike the same from the files. The affidavits and the amended affidavits are not set forth in the bill of exceptions, therefore, there is nothing for this court to pass upon. It has been repeatedly held both in our Appellate and Supreme Courts that the action of the trial court in striking an affidavit of merits from the files cannot be urged as error in the Appellate court if the stricken affidavits are not included in the bill of exceptions. In the case of Gaynor v. Hibernia Savings Bank, 166 Ill., page 577, the court in passing on the identical question that we are now considering, use this language (page 579): "The only error alleged is, that the court erred in striking the plea from the files, and it has been repeatedly held that such action of the court cannot be considered unless the motion, the decision and an exception thereto are presented in a bill of exceptions, so that the error, if any, may appear from the record. Where there is no bill of exceptions the motion and decision do not become a part of the record, and it will be presumed that the action of the court was correct. (Snell v. Trustees M. E. Church, 58 Ill. 290; Caddy v. McCleave 59 id. 182; Reed v. Horne, 73 id. 598; Harms v. Aufield, id. 257; Fanning v. Russell, 81 id. 398). In all of these cases pleas were stricken from the files, and in each of them the precise

question now presented was decided. In the last case it was said that the pleas stricken from the files presented on their face a good defense to the action, but as a case might occur where an order striking them from the files would be proper it would be presumed, in the absence of a bill of exceptions, that a proper case for such an order was made." To the same effect is the case of Beckers v. City of Kankakee, 213 App. 538, a second district case, in which this court say: "We conclude that such separate affidavits are a part of the record for the purpose of limiting the issues to be tried unless they have been stricken from the record, and that while they so remain a part of the record they are examinable by a court of review without a bill of exceptions, and that such affidavit of claim is, therefore, a part of the record on which to base a judgment by default. Whenever they are stricken from the files they cease to be a part of the record until placed therein by a bill of exceptions." In Harris v. Willis, 209 Ill. App. 401, of the first district, the Appellate Court had the identical question before them and they held: "A plea which has been stricken from the files is no longer a part of the common law record and can be brought to the attention of the court of review by a bill of exceptions only." - National Weeklies v. Klein, 262 Ill. App. 146; Gerbracht v. Lake County, 328 Ill. 399-405."

On October 6, 1934, after the case had been taken under advisement by the court, the plaintiffs in error, Marie L. Gruner and Lena K. Bush, entered their motion to set aside the order to take said case under advisement and asked leave to file a motion of severance. Owing to the fact that this court is of the opinion that the judgment of the trial court should be affirmed we do not see any useful purpose in allowing a severance. Therefore, the motion to set aside the order taking the case under advisement and for leave to file a motion for severance is denied.

The whole defense of the defendants to the suit on this note rested upon their affidavit of meritorious defense filed with their pleas. These affidavits are not incorporated in the bill of exceptions, and therefore, we are of the opinion that there is nothing for this court to pass upon, and it will be presumed that the trial court properly struck the affidavits of meritorious defense from the records. The judgment of the Circuit Court of Peoria County is hereby affirmed.

Affirmed.

the whole purpose of the document is to give an account of the
reality of the situation of the country and the people, and to show
the progress of the work of the Government. The document is divided into
four parts, the first of which is devoted to the general situation of the
country, the second to the work of the Government, the third to the
work of the people, and the fourth to the work of the Government.
The first part is devoted to the general situation of the country, and
the second to the work of the Government. The third part is devoted to
the work of the people, and the fourth to the work of the Government.
The document is divided into four parts, the first of which is devoted to
the general situation of the country, the second to the work of the
Government, the third to the work of the people, and the fourth to the
work of the Government. The first part is devoted to the general
situation of the country, and the second to the work of the Government.
The third part is devoted to the work of the people, and the fourth to
the work of the Government. The document is divided into four parts, the
first of which is devoted to the general situation of the country, the
second to the work of the Government, the third to the work of the
people, and the fourth to the work of the Government.

1919

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

888
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in
the year of our Lord one thousand nine hundred and thirty-four,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 632

BE IT REMEMBERED, that afterwards, to-wit: On
JAN 10 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1934

Frank G. Keplinger,
Appellee,

vs.

Anne R. Lord, et al, as Trustees
of the Appolos Camp and Bennet
Humiston Trust,
Appellants.

Appeal from the Circuit Court
of Livingston County

WOLFE -F. J.

Frank Keplinger filed a bill in the circuit court of Livingston county to foreclose a trust deed in the nature of a mortgage. Anne R. Lord, et al, as trustees under the trust deed were made defendants to the bill. The trustees filed their answer in which they aver that the complainant was not entitled to the relief sought because the trust which they represented was a public one and that the Attorney General of the State of Illinois was a necessary party to the suit and should have been made a party defendant. A replication was filed to the answer and the case was referred to the master in chancery to take evidence and report his conclusions of facts and law in the case. The master having heard the evidence made a report recommending the entry of a decree in conformity with the prayer of the bill. The trustees filed objections to this report, charging that the master had heard the evidence in the absence of the Attorney General, a necessary party to the suit. The objections were allowed to stand as exceptions and were overruled by the chancellor. A decree of sale was entered December 15, 1933. From that decree the trustees prosecuted an appeal to the Supreme Court of Illinois. The Supreme Court transferred the case to this court.

Harriet Humiston, a resident of the City of Pontiac in Livingston county, executed her last will and testament September 4, 1920. Shortly

In the Circuit Court of Illinois

Second Division

October Term, A. D. 1904

Frank G. Replinger,
Appellee,

Appel from the Circuit Court

vs.

of Livingston County

Anna F. Lord, et al., as Trustees
of the Apollo Camp and School
Huntston Trust,
Appellants.

WORTH - T. J.

Frank Replinger filed a bill in the circuit court at Livingston county to dissolve a trust deed in the nature of a mortgage. Anna F. Lord, et al., as trustees under the trust deed were made defendants to the bill. The trustees filed their answer in which they aver that the complainant was not entitled to the relief sought because the trust which they represented was a public one and that the Attorney General of the State of Illinois was a necessary party to the suit and should have been made a party defendant. A replication was filed to the answer and the case was referred to the master in equity to take evidence and report his conclusions of facts and law in the case. The master having heard the evidence made a report recommending the entry of a decree in conformity with the prayer of the bill. The trustees filed objections to this report, contending that the master had heard the evidence in the absence of the Attorney General, a necessary party to the suit. The objections were allowed to stand as exceptions and were overruled by the Chancellor. A decree of sale was entered December 20, 1904. From that decree the trustees prosecuted an appeal to the Supreme Court of Illinois. The Supreme Court affirmed the case in this court.

Harrist Huntston, a resident of the City of Forties in Livingston county, executed her last will and testament September 4, 1900. Shortly

afterward she died and her will was admitted to probate in the County court of Livingston County. By her last will and testament Harriet Humiston created a trust to be devoted to educational and charitable purposes for the benefit of the inhabitants of the City of Pontiac. For this purpose she devised and bequeathed to five trustees the major part of her estate and conferred upon them ample power to administer the trust. The appellants in this case are the trustees of this trust estate at this time. The heirs at law of the testatrix filed a bill to contest her will and a compromise of this litigation was affected. The trustees on or about August 18th, 1930, asked permission from the circuit court of Livingston county to mortgage the trust property to the aggregate amount of \$130,000.00. In pursuance of this authority they did execute three trust deeds in the nature of a mortgage upon certain parcels of land belonging to the trust estate to secure the payment of this amount. A part of the mortgage indebtedness was sold to Frank G. Keplinger, the appellee in this suit, and it is on this indebtedness that he seeks to foreclose his trust deed.

The only question before this court is, whether the Attorney General was a necessary party to this litigation in the trial court. If he is not a necessary party the decree of the lower court should be affirmed.

The Supreme Court in this same case, Keplinger v. Lord, reported in Vol. 357 Ill. 571, on page 574, in transferring this case to the Appellate Court, use this language: "The appellants contend that this case concerns a public trust; that in such a case the Attorney General is the representative of the people of the State and a necessary party to the bill of complaint, and consequently, than an appeal from a decree affecting such a trust must be prosecuted directly to this court. No other ground for this court's jurisdiction of a direct appeal from the decree of the circuit court is asserted. Section 118

afterward she died and her will was admitted to probate in the County
Court of Livingston County. In her last will and testament Harriet
Humiston created a trust to be managed for educational and charitable
purposes for the benefit of the inhabitants of the City of Pontiac.
For this purpose she devised and bequeathed to give in and to
major part of her estate and conferred upon them ample power to ad-
minister the trust. The appellants in this case are the trustees
of this trust estate at this time. The heirs at law of the testatrix
filed a bill to contest her will and a compromise of this litigation
was effected. The compromise of or about March 1931, which was
permitted from the Circuit Court of Livingston County to mortgage
the trust property to the appellees for a sum of \$100,000.00. In pur-
suance of this authority they did execute three first deeds in the
nature of a mortgage upon certain parcels of land belonging to the
trust estate to secure the payment of this amount. A part of this
mortgage indebtedness was sold to Harry A. Leachman, the appellee
in this suit, and it is on this indebtedness that he seeks to fore-
close his trust deed.

The only question before this court is, whether the attorney
general was a necessary party to this litigation in this trust court.
If he is not a necessary party the decree of the lower court should
be affirmed.

The Supreme Court in this same case, *Leachman v. Trust*, reported
in Vol. 137 Ill. 571, on page 574, in transferring this case to the
Appellate Court, use this language: The appellant contends that this
case concerns a public trust; that in such a case the attorney general
is the representative of the people of the State and a necessary party
to the bill of complaint, and consequently, that an appeal from a
decree affecting such a trust must be prosecuted directly to this
court. No other ground for this court's jurisdiction of a direct
appeal from the decree of the circuit court is asserted. Section 118

of the Practice Act, to the extent that it is pertinent here, provides that appeals from the circuit courts, the superior and criminal courts of Cook county, the county and city courts, in all cases which the State is interested as a party or otherwise, shall be taken directly to the Supreme Court. The State is interested in a case, within the contemplation of the particular section of the Practice Act, only when it has a direct and substantial, as distinguished from a mere nominal interest in the subject matter of the litigation. * * *

Moreover, the direct and substantial interest which is the condition of a direct appeal, it has been said, must be an interest of a monetary character. * * * Neither the State nor the Attorney General is a party to this suit. The remoteness of the State's interest in the controversy is manifest from the provisions of the will creating the Appollos Camp and Bennet Humiston Trust. The testatrix devised and bequeathed the property constituting the corpus of the trust to five trustees and charged them with its control and management for the benefit of the inhabitants of the city of Pontiac. Title to the trust estate is vested in the appellants as the trustees and they possess wide discretionary powers with respect to the administration of the trust. Whatever interest the State may have in the result of the litigation or in the determination of the question whether the Attorney General is a necessary party to the suit, clearly that interest is neither direct and substantial nor monetary, and affords this court no basis for jurisdiction of a direct appeal."

Our Supreme court has definitely decided that the Attorney General is not a necessary party to this litigation and it is our opinion that the decree of the lower court should be and it is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

5729
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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. ELAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

278 I.A. 632^r

BE IT REMEMBERED, that afterwards, to-wit: On
JAN 10 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1933.

John G. Ericksen, et al

Appellants,

vs.

Appeal from the Circuit
Court of Lake County.

C. A. Winn, et al

Appellees.

DOVE, J.

On June 23, 1922, A. F. Beaubien entered into a written agreement with Grace L. Abernethy, by which Beaubien agreed to sell and Grace Abernethy agreed to purchase certain premises along Sheridan Road in Waukegan for \$32,900.00, of which amount \$300.00 was paid in cash and \$300.00 or more was to be paid on the first day of each month thereafter.

On August 28, 1922, an agreement and declaration of trust was executed by Harvey J. Berndt, C. A. Winn, William H. Kuhlwein, J. G. Ericksen and the said Grace Abernethy. This declaration of trust recited that Berndt and Abernethy were the owners of certain personal property suitable for the equipment of a sanitarium and were also the owners of the said contract which was dated June 23, 1922 and which is hereinafter spoken of as the Beaubien-Abernethy contract. The declaration of trust further recited that Berndt and Abernethy have transferred said personal property suitable for sanitarium purposes and said Beaubien-Abernethy contract to said Winn, Kuhlwein and Erickson as trustees who agreed to hold the same and all other property which they might acquire as trustees for the benefit of the holders of the beneficiary certificates which might be issued in pursuance of the declaration of trust. This declaration of trust

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1933.

John G. Erickson, et al

Appellants,

vs.

Appeal from the Circuit
Court of Lake County.

C. A. Winn, et al

Appellees.

DOVE, J.

On June 28, 1932, A. T. Beaudien entered into a written agreement with Grace L. Abernethy, by which Beaudien agreed to sell and Grace Abernethy agreed to purchase certain premises along Sheridan Road in Jankegan for \$32,900.00, of which amount \$300.00 was paid in cash and \$300.00 or more was to be paid on the first day of each month thereafter.

On August 28, 1932, an agreement and declaration of trust was executed by Harvey J. Berndt, C. A. Winn, William H. Kuhlwein, J. G. Erickson and the said Grace Abernethy. This declaration of trust recited that Berndt and Abernethy were the owners of certain personal property suitable for the equipment of a sanitarium and were also the owners of the said contract which was dated June 28, 1932 and which is hereinafter spoken of as the Beaudien-Abernethy contract. The declaration of trust further recited that Berndt and Abernethy have transferred said personal property suitable for a sanitarium purposes and said Beaudien-Abernethy contract to said Winn, Kuhlwein and Erickson as trustees who agreed to hold the same and all other property which they might acquire as trustees for the benefit of the holders of the beneficiary certificates which might be issued in pursuance of the declaration of trust. This declaration of trust

provided that the trustees should be three in number, also the length of the terms of their office, how their successors should be elected and provided that these trustees, in their collective capacity were to be designated as Sheridan Road Sanitarium and that they would hold the legal title to all property belonging to the trust and should have exclusive control and management thereof. It provided for the issuance of preferred and common beneficiary certificates, specified the form thereof, authorized the trustees to terminate the trust and provided that upon dissolution, all debts and expenses should be paid before the holders of either the preferred or common beneficial interests should receive anything.

On August 6, 1924, this cause was instituted by John G. Ericksen, Tillman L. Lusk, S. J. Lidov, Inga J. Wagner and Lillian Sorensen and subsequently, on November 6, 1925, an amended and supplemental bill was filed. The amended and supplemental bill alleged the execution of the Beaubien-Abernethy contract, as well as the declaration of trust heretofore referred to. It then alleged that the real estate described in the Beaubien-Abernethy contract was being used by the trustees as a sanitarium, known as the Sheridan Road Sanitarium: that complainants Ericksen and

Lusk were creditors of said trust and the other complainants were owners and holders of beneficial interests therein: That on June 30, 1924, Beaubien notified Ericksen, as trustee, of certain defaults in the Beaubien-Abernethy contract and subsequently Beaubien on June 22, 1925 and again on July 23, 1924 served on Ericksen notices for the purpose of forfeiting this contract, but that Ericksen had ceased to act as trustee and was not acting as trustee in June, 1925. It was also alleged that the Sheridan Road Sanitarium was insolvent and that it was impossible to carry out the purpose for which the trust was created: that the trustees had adopted a resolution that the property be sold, but the other trustees (Winn and Abernethy)

provided that the trustees should be three in number, and the length of the term of their office, now their successors should be elected and provided that these trustees, in their collective capacity were to be designated as Sheridan Road Sanitarium and that they would hold the legal title to all property belonging to the trust and should have exclusive control and management thereof. It provided for the issuance of preferred and common beneficiary certificates, specified the form thereof, authorized the trustees to terminate the trust and provided that upon dissolution, all debts and expenses should be paid before the holders of either the preferred or common beneficial interests should receive anything.

On August 6, 1924, this cause was instituted by John C. Erickson, William L. Luak, E. J. Lidov, Inge J. Wagner and William Gorenson and subsequently, on November 8, 1925, an amended and supplemental bill was filed. The amended and supplemental bill alleged the execution of the Besnidian-Abramethy contract, as well as the declaration of trust heretofore referred to. It then alleged that the real estate described in the Besnidian-Abramethy contract was being used by the trustees as a sanitarium, known as the Sheridan Road Sanitarium; that complainants Erickson and Luak were creditors of said trust and the other complainants were owners and holders of beneficial interests therein; That on June 30, 1924, Besnidian notified Erickson, as trustee, of certain defaults in the Besnidian-Abramethy contract and subsequently Besnidian on June 28, 1925 and again on July 23, 1924 served on Erickson notices for the purpose of forfeiting this contract, but that Erickson had ceased to act as trustee and was not acting as trustee in June, 1925. It was also alleged that the Sheridan Road Sanitarium was insolvent and that it was impossible to carry out the purpose for which the trust was created; that the trustees had adopted a resolution that the property be sold, but the other trustees (Winn and Abramethy)

refused to consider any offer of sale or cooperate with Ericksen (the remaining trustee), and were paying excessive salaries to themselves. The amended and supplemental bill averred that on August 8, 1924, T. J. Stahl was appointed receiver by the Circuit Court of Lake County, of the personal property belonging to the trust and qualified as such receiver: that Beaubien knew of such appointment, but gave no notice to the receiver of his purpose to forfeit the Beaubien-Abernethy contract. This amended and supplemental bill then alleged that on July 31, 1925 Beaubien had entered into a contract for the sale of the property described in the Beaubien-Abernethy contract to L. Elmer Hulse, who was a partner of T. J. Stahl, the receiver; that on October 28, 1925 Beaubien with the consent of Hulse entered into a contract for the sale of the same premises to George F. Wieland: that complainants were ready, willing and able to pay Beaubien the amount that may be found to be due him upon this contract and prayed that the attempted forfeiture thereof be declared null and void.

The original bill made C. A. Winn, Grace L. Abernethy, Harvey J. Berndt, Bethia Abernethy, J. M. Lowe, Administrator of the estate of Emma G. Stewart, deceased, P. K. Lawrence, and Flora M. Baugh defendants. The amended and supplemental bill made Beaubien, Stahl and Wieland additional defendants. The original bill prayed that there be an accounting as to the acts of the trustees: that the trust be dissolved: that the rights of creditors, trustees, and the owners of the beneficial interests be ascertained and adjusted, the assets distributed, the real estate be sold and that a receiver be appointed to take charge of the personal property including the books and accounts of the Sanitarium and collect the amount due. The amended and supplemental bill prayed for the same relief and in addition that the attempted forfeiture of the Beaubien-Abernethy contract be declared null and void and that the receiver theretofore

refused to consider any offer of sale or cooperate with Erickson (the remaining trustee), and were paying excessive salaries to themselves. The amended and supplemental bill averred that on August 8, 1934, T. J. Stahl was appointed receiver by the Circuit Court of Lake County, of the personal property belonging to the trust and qualified as such receiver; that Besubien knew of such appointment, but gave no notice to the receiver of his purpose to forfeit the Besubien-Abernethy contract. This amended and supplemental bill alleged that on July 31, 1935 Besubien had entered into a contract for the sale of the property described in the Besubien-Abernethy contract to L. Elmer Hulse, who was a partner of T. J. Stahl, the receiver; that on October 28, 1935 Besubien with the consent of Hulse entered into a contract for the sale of the same premises to George T. Wieland; that complainants were ready, willing and able to pay Besubien the amount that may be found to be due him upon this contract and prayed that the attempted forfeiture thereof be declared null and void.

The original bill made O. A. Winn, Grace L. Abernethy, Harvey J. Berndt, Betina Abernethy, J. M. Lowe, Administrator of the estate of Emma G. Stewart, deceased, F. M. Lawrence, and Flora M. Bough defendants. The amended and supplemental bill made Besubien, Stahl and Wieland additional defendants. The original bill prayed that there be an accounting as to the sale of the trustees; that the trust be dissolved; that the rights of creditors, trustees, and the owners of the beneficial interests be ascertained and adjusted, the assets distributed, the real estate be sold and that a receiver be appointed to take charge of the personal property including the books and accounts of the partnership and collect the amount due. The amended and supplemental bill prayed for the same relief and in addition that the attempted forfeiture of the Besubien-Abernethy contract be declared null and void and that the receiver therefore

appointed be continued. Subsequently Jeanette Levy was substituted as a party defendant in lieu of J. M. Low, Administrator, and the amended and supplemental bill was amended to show the resignation of Kuhlwein as trustee and the election of Bethia Abernethy as trustee in his stead. On August 8, 1924, T. J. Stahl, upon notice and pursuant to the prayer of the original bill, was appointed receiver by the Circuit Court of Lake County and thereafter qualified and acted as such receiver.

Grace L. Abernethy and Bethia Abernethy answered the amended and supplemental bill admitting substantially all the allegations therein and on June 11, 1929 filed their cross-bill in which they alleged that Bethia Abernethy, at the time the original bill was filed, was in charge of the sanitarium as manager and continued as manager under Stahl after he took charge as receiver: that on October 28, 1925, Stahl notified Bethia Abernethy of the sale of the property to Wieland: that thereupon she requested Beaubien to act as her attorney, but he advised her she did not need an attorney as Stahl, the receiver, would protect her interests: that Stahl informed her of the cancellation and forfeiture of the Beaubien-Abernethy contract, told her the property had been sold and stated that she had no further rights therein except she would be entitled to share in the proceeds of the sale: that at the request of Stahl, these cross-complainants executed what they afterward learned were quit claim deeds to the sanitarium property, but they did so in ignorance of their rights and without legal advice and upon the fraudulent representations of Stahl. This cross-bill prayed for the cancellation of these deeds in addition to the relief prayed for in the amended and supplemental bill.

A. F. Beaubien answered the amended and supplemental bill and also the cross-bill. He admitted the execution of the Beaubien-Abernethy contract, alleged the forfeiture thereof and admitted the service of the forfeiture notices. He averred that there was no

appointed as receiver. Subsequently, the receiver was substituted as a party defendant in lieu of J. M. Low, Administrator, and the amended and supplemental bill was amended to show the resignation of Kuhlwein as trustee and the election of Bethia Abernethy as trustee in his stead. On August 3, 1934, J. J. Stahl, upon notice and pursuant to the prayer of the original bill, was appointed receiver by the Circuit Court of Lake County and thereafter qualified and acted as such receiver.

Grace L. Abernethy and Bethia Abernethy answered the amended and supplemental bill admitting substantially all the allegations therein and on June 11, 1935 filed their cross-bill in which they alleged that Bethia Abernethy, at the time the original bill was filed, was in charge of the sanitarium as manager and continued as manager under Stahl after he took charge as receiver; that on October 28, 1935, Stahl notified Bethia Abernethy of the sale of the property to Wieland; that thereupon she requested Beschman to act as her attorney, but he advised her she did not need an attorney as Stahl, the receiver, would protect her interests; that Stahl informed her of the cancellation and forfeiture of the Beschman-Abernethy contract, told her the property had been sold and stated that she had no further rights therein except she would be entitled to share in the proceeds of the sale; that at the request of Stahl, these cross-complaints executed what they afterward learned were quit claim deeds to the sanitarium property, but they did so in ignorance of their rights and without legal advice and upon the fraudulent representations of Stahl. This cross-bill prayed for the cancellation of these deeds in addition to the relief prayed for in the amended and supplemental bill.

A. T. Beschman answered the amended and supplemental bill and also the cross-bill. He admitted the execution of the sanitarium contract, alleged the forfeiture thereof and admitted the service of the forfeiture notices. He averred that there was no

valid assignment of the contract to the trust, denied the validity of the order appointing Stahl receiver, admitted the execution of the Hulse and Wieland contracts, but denied all the other allegations of the amended and supplemental bill and of the cross-bill. T. J. Stahl answered the amended and supplemental bill admitting his appointment as receiver and the partnership between himself and Hulse, but denied that he had any notice of any interest which the trustees might have had in the property. Geo. F. Wieland answered the amended and supplemental bill and the cross-bill and insisted that he was an innocent purchaser of the premises from Beaubien. The complainants in the amended and supplemental bill answered the cross-bill admitting the allegations therein. All other defendants in the original bill and cross-bill were defaulted and the issues having been made up, the cause was referred to the Master to take the evidence and report his conclusions of law and fact. The Master found the equities of the cause to be with defendants Stahl, Beaubien and Wieland and recommended a decree dismissing the amended and supplemental bill and the cross-bill for want of equity. Objections were filed to the Master's report, which were ordered to stand as exceptions and at the hearing of the exceptions by the Chancellor, on July 20, 1933, the complainants sought leave to amend their amended and supplemental bill so that it would allege that Beaubien received from Stahl, the receiver, payments of \$300.00 upon the purchase price of the premises on July 31st, September 8th and October 2nd, 1925 and that by so doing, Beaubien waived his notices of forfeiture and the Beaubien-Abernethy contract therefore remained in full force and that by reason of the sale of the premises by Beaubien to Hulse and Wieland, Beaubien, by so doing, unlawfully repudiated the Beaubien-Abernethy contract and thereby became indebted to the trustees of the sanitarium in the sum of \$12,000.00, with interest thereon, said \$12,000.00 being the aggregate amount of the payments made by the trustees upon said contract.

valid assignment of the contract to the trust, denied the validity of the order appointing Stahl receiver, admitted the execution of the Hulse and Wisland contracts, but denied all the other allegations of the amended and supplemental bill and of the cross-bill. T. J. Stahl answered the amended and supplemental bill admitting his appointment as receiver and the partnership between himself and Hulse, but denied that he had any notice of any interest which the trustees might have had in the property. Geo. F. Ireland answered the amended and supplemental bill and the cross-bill and insisted that he was an innocent purchaser of the premises from Beaudien. The complainants in the amended and supplemental bill answered the cross-bill admitting the allegations therein. All other defendants in the original bill and cross-bill were defaulted and the issues having been made up, the cause was referred to the Master to take the evidence and report his conclusions of law and fact. The Master found the evidence of the cause to be with defendants Stahl, Beaudien and Wisland and recommended a decree dismissing the amended and supplemental bill and the cross-bill for want of equity. Objections were filed to the Master's report, which were ordered to stand as exceptions and at the hearing of the exceptions by the Chancellor, on July 30, 1933, the complainants sought leave to amend their amended and supplemental bill so that it would allege that Beaudien received from Stahl, the receiver, payments of \$300.00 upon the purchase price of the premises on July 31st, September 8th and October 2nd, 1932 and that by so doing, Beaudien waived his notices of forfeiture and the Beaudien-Abernethy contract therefore remained in full force and that by reason of the sale of the premises by Beaudien to Hulse and Wisland, Beaudien, by so doing, unlawfully repudiated the Beaudien-Abernethy contract and thereby became indebted to the trustees of the settlement in the sum of \$12,000.00, with interest thereon, said \$12,000.00 being the aggregate amount of the payments made by the trustees upon said contract.

The proposed amendment prayed that an accounting should be taken and the court then decree that Beaubien pay to Stahl, the receiver, said sum of \$12,000.00 and interest to be distributed by Stahl to the beneficiaries and creditors of said trust, under the directions of the court.

The Chancellor denied leave to file this amendment, but sustained exceptions to the Master's report as to the receiver Stahl, and ordered him to file, within thirty days, a complete accounting of any profits he may have made. The chancellor overruled the exceptions to the Master's findings as to the defendants Beaubien and Wieland and entered a decree on July 20, 1933, in their favor dismissing the bill and the cross-bill as to them for want of equity. From this decree, the complainant John G. Ericksen has perfected this appeal and the record is before this court for review. Alexander F. Beaubien is the only appellee who has filed a brief in this court.

As heretofore pointed out, the complainants in the amended and supplemental bill sought to have the action of Beaubien in forfeiting the Beaubien-Abernethy contract declared null and void and they averred that they were ready, willing and able to pay Beaubien the amount that may be found to be due him under the Beaubien-Abernethy contract. It was upon the issues raised by this amended and supplemental bill, the answers thereto and the cross-bills and answers that the evidence was taken. The amendment which complainants sought to file at the time the decree was rendered on July 20, 1933, also sought to have the action of Beaubien in forfeiting the Beaubien-Abernethy contract set aside, but averred that Beaubien's action in entering into the Hulse and Weiland contracts was in effect a repudiation of the Beaubien-Abernethy contract and sought to hold Beaubien to account for the \$12,000.00 and interest which had been paid upon the Beaubien-Abernethy contract. Ordinarily courts are liberal in permitting amendments to be made and if the amendment proposed on July 20, 1933 simply sought to make the allegations of the amended and supplemental bill conform to the proofs, then the

The one owed amount was, to the court, the one that should be paid, and the court then decreed that Beaudien was to pay, and the court also an amount of \$12,000.00 and interest to be paid by Beaudien to the beneficiaries and creditors of said trust, under the directions of the court.

The Chancellor denied leave to file this amendment, but sustained exceptions to the Master's report as to the receiver Stahl, and ordered him to file, within thirty days, a complete accounting of any profits he may have made. The chancellor overruled the exceptions to the Master's findings as to the defendant Beaudien and Weland and entered a decree on July 30, 1933, in their favor dismissing the bill and the cross-bill as to them for want of equity. From this decree, the complainant John G. Erickson has perfected this appeal and the record is before this court for review. Alexander T. Beaudien is the only appellee who has filed a brief in this court.

As heretofore pointed out, the complainants in the amended and supplemental bill sought to have the action of Beaudien in forfeiting the Beaudien-Abernethy contract declared null and void and they averred that they were ready, willing and able to pay Beaudien the amount that may be found to be due him under the Beaudien-Abernethy contract. It was upon the issues raised by this amended and supplemental bill, the answers thereto and the cross-bills and answers that the evidence was taken. The amendment which complainants sought to file at the time the decree was rendered on July 30, 1933, also sought to have the action of Beaudien in forfeiting the Beaudien-Abernethy contract set aside, but averred that Beaudien's action in entering into the Kraus and Weland contracts was in effect a repudiation of the Beaudien-Abernethy contract and sought to hold Beaudien to account for the \$12,000.00 and interest which had been paid upon the Beaudien-Abernethy contract. Ordinarily courts are liberal in permitting amendments to be made and if the amendment proposed on July 30, 1933 simply sought to make the allegations of the amended and supplemental bill conform to the facts, then the

complainants had the right to so amend their pleadings at any time before the decree was entered.

The evidence disclosed and the Master found that T.J. Stahl and L. Elmer Hulse were partners engaged in the real estate brokerage business in Waukegan in June, 1922 and represented Beaubien and negotiated the Beaubien-Abernethy contract and collected the monthly payments thereunder, and for their services received compensation from Beaubien. That the contract was never recorded but placed in escrow with the Lake County Title and Trust Company. That Grace Abernethy entered into the contract on behalf of her mother, Bethia Abernethy, who was the real purchaser. That on September 27, 1923 the trustees adopted a resolution to the effect that the property should be sold but C. A. Winn and Bethia Abernethy refused to co-operated with Ericksen, the other trustee, in selling the same. That Stahl was appointed receiver on August 8, 1924 and beginning with September 12, 1924, Stahl paid Beaubien \$300.00 each month except April, 1925, to and including June 5, 1925. That on June 22, 1925, there was a default under the terms of the Beaubien-Abernethy contract, so far as the payment of insurance premiums and taxes were concerned, and on that day Beaubien direct a notice to Grace L. Abernethy, Bethia Abernethy, C. A. Winn, John G. Erickson and the Sheridan Road Sanitarium, which recited these defaults and stated that because thereof, Beaubien had elected to declare the whole balance of said contract due, and unless the whole was paid on or before July 15, 1925, he would forfeit the contract. This notice was served upon appellant on June 22, 1925. On June 29, 1925 Stahl again paid Beaubien another \$300.00 and Beaubien accepted the same. On July 23, 1925 another notice, signed by Beaubien and which was directed to the same parties as the previous one of June 22, 1925, and which stated that Beaubien had declared the Beaubien-Abernethy contract forfeited on account of the failure of the parties to whom the notice was addressed to pay insurance and taxes as required by the Beaubien-Abernethy con-

complaints in the trial to so amend their pleading at any time before the decree was entered.

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tract and which demanded immediate possession of the premises was served on appellant, Ericksen.

The Master further found that thereafter and on July 31, 1925 Beaubien received from Stahl another \$300.00 payment and on the same day, he, Beaubien, entered into a contract with L. Elmer Hulse, by the terms of which Beaubien agreed to sell and Hulse agreed to buy the real estate in question for the amount which was due him under the Abernethy agreement, which included \$1945.24 unpaid taxes and \$303.64 unpaid insurance premiums. On September 8, 1925 and again on October 2, 1925, Beaubien received from Stahl \$300.00. On October 28, 1925 Hulse surrendered his interest in the contract of July 21, 1925 and requested Beaubien to enter into a new contract with George F. Wieland, and this was done. The purchase price in the Wieland contract was \$40,000.00, of which amount \$5951.06 was paid in cash to Stahl and Hulse and a note for \$5,000.00 was executed by Wieland and payable to Hulse. Of this amount Berthia Abernethy received \$199.00 in cash and a statement of Stahl and Company to the effect that they were holding for her \$1500.00 in cash and a note for \$2500.00. On this same date, Grace Abernethy and Bethia Abernethy executed and delivered to Beaubien their quit claim deed for the real estate involved herein. Prior to that time and on July 30, 1925 they executed a release of the Beaubien-Abernethy contract and directed Beaubien to sell the property to Hulse. The Master further found that the amount due under the provisions of the Beaubien-Abernethy contract, on July 31, 1925, was approximately \$31,000.00, of which amount more than \$2,200.00 represented back taxes and insurance past due, and that at the time of the hearing the amount which would be due thereunder was approximately \$44,000.00.

The Master further found that the consideration for the execution of the quit claim deed by Grace and Bethia Abernethy and their release of the Beaubien-Abernethy contract was this cash payment and notes and represented the share of the Abernethys in the profits of the contract which Beaubien entered into with Wieland.

trust and which remained in the possession of the trustee was served on the trustee, Richard M. The Master further found that the trustee on July 1, 1935 Beardsley received from the trust another \$200.00 payment and on the same day, he, Beardsley, entered into a contract with H. H. Hulse, by the terms of which Beardsley agreed to sell and Hulse agreed to buy the real estate in question for the amount which was due him under the Abernethy agreement, which included \$19,734.00 unpaid taxes and \$303.84 unpaid insurance premiums. On September 8, 1935 and again on October 2, 1935, Beardsley received from Stein \$300.00. On October 28, 1935 Hulse surrendered his interest in the contract of July 31, 1935 and requested Beardsley to enter into a new contract with George F. Wieland, and this was done. The purchase price in the Wieland contract was \$40,000.00, of which amount \$35,000.00 was paid in cash to Stein and Hulse and a note for \$5,000.00 was executed by Wieland and payable to Hulse. Of this amount Bertha Abernethy received \$19,000.00 in cash and a statement of Stein and company to the effect that they were holding for her \$19,000.00 in cash and a note for \$2500.00. On this same date, Grace Abernethy and Bertha Abernethy executed and delivered to Beardsley their quit claim deed for the real estate involved herein. Prior to that time and on July 30, 1935 they executed a release of the Beardsley-Abernethy contract and directed Beardsley to sell the property to Hulse. The Master further found that the amount due under the provisions of the Beardsley-Abernethy contract, on July 31, 1935, was approximately \$31,000.00, of which amount more than \$2,500.00 represented back taxes and insurance past due, and that at the time of the hearing the amount which would be due thereunder was approximately \$4,000.00.

The Master further found that the consideration for the execution of the quit claim deed by Grace and Bertha Abernethy and their release of the Beardsley-Abernethy contract was the cash payment and notes and represented the share of the Abernethys in the profits of the contract which Beardsley entered into with Wieland.

That the release and deed were both executed with the full knowledge of their meaning by the Abernethys. That Stahl, as receiver, took no interest in the Beaubien-Abernethy contract. That the forfeiture of that contract by Beaubien was warranted and in due form, and complainants are not entitled to have that forfeiture set aside because they do not offer to do equity by carrying out the provisions of that contract or tendering the amount due thereon.

The conclusions of the Master were supported by the evidence, and in our view of the case, we do not see how any decree other than the one that was entered would have been justified. There is no dispute about the facts. Beaubien at all times had the legal title to these premises. He made a valid, binding contract with the Abernethys. His dealings were all with them and he, so far as disclosed by this record, never consented to an assignment thereof to the trustees of the sanitarium. He did receive the monthly installments from Stahl, but Stahl was engaged in the real estate business, had represented Beaubien in the negotiation of this contract and prior to the time any forfeiture was attempted, had collected the installments for Beaubien and paid them to him. By assigning their interest in this contract to the Sheridan Road Sanitarium, the Abernethys did not, without Beaubien's consent, relieve themselves of the liability to make the payments and perform the covenants therein contained, and the trustees at no time obligated the trust to make those payments or perform the covenants in that agreement. It is conceded by all that the provisions of the contract were not being carried out and that on June 23, 1925 and July 23, 1925 defaults had occurred which justified Beaubien in taking the action he did. Counsel for appellant insists, however, that because after July 23, 1925, Beaubien accepted \$300.00 on July 31, 1925, and alike sum on September 8, 1925 and a like sum on October 2, 1925 he waived the declared forfeiture of this contract. We do not think so. At these times the actual physical

That the release and deed were both executed with the full knowledge of their meaning by the Abernethys. That Stahl, as receiver, took no interest in the Beaudin-Abernethy contract. That the forfeiture of that contract by Beaudin was warranted and in due form, and complainants are not entitled to have that forfeiture set aside because they did not offer to do equity by carrying out the provisions of that contract or tendering the amount due thereon. The conclusions of the Master were supported by the evidence, and in our view of the case, we do not see how any decree other than the one that was entered would have been justified. There is no dispute about the facts. Beaudin at all times had the legal title to these premises. He made a valid, binding contract with the Abernethys. His dealings were all with them and he, so far as disclosed by this record, never consented to an assignment thereof to the trustees of the Sanitarium. He did receive the monthly installments from Stahl, but Stahl was engaged in the real estate business, had represented Beaudin in the negotiation of this contract and prior to the time any forfeiture was attempted, had collected the installments for Beaudin and paid them to him. By assigning their interest in this contract to the Sanitarium Board, the Abernethys did not, without Beaudin's consent, relieve themselves of the liability to make the payments and perform the covenants therein contained, and the trustees at no time obligated the trust to make those payments or perform the covenants in that agreement. It is conceded by all that the provisions of the contract were not being carried out and that on June 22, 1925 and July 23, 1925 Beaudin had occurred which justified Beaudin in taking the action he did. Counsel for appellant insists, however, that because after July 23, 1925, Beaudin received \$300.00 on July 31, 1925, and also on September 9, 1925 and a like sum on October 2, 1925 he waived the default forfeiture of this contract. We do not think so. At these times the actual physical

possession of the property was in Bethia Abernethy and she knew she was in default and that the contract under which she came into possession of the Sanitarium provided that in case of default, \$300.00 per month was stipulated as reasonable rental for the use and occupancy thereof. The chief relief sought by the original bill was to terminate the trust because of insolvency it was impossible to carry out the purposes for which it was created. The evidence disclosed that the Abernethys were also insolvent and unable to make the payments or comply with the provisions of the Beaubien-Abernethy contract. Certainly after default and under these and other circumstances shown in this record to exist, Beaubien was entitled to receive a fair and reasonable compensation for the use and occupation of his property while it was being withheld from him, Claussen v. Claussen, 279 Ill. 99, Ryan v. Shoenberger, 224 Ill. App. 308, and we do not think his acceptance of these payments made subsequent to July 23, 1925 waived his declared forfeiture of the Beaubien-Abernethy contract.

Counsel for appellant further insist that in contemplation of law, Stahl as receiver had possession of this real estate, that his possession was that of the court which appointed him and the notice of forfeiture is fatally defective because not served upon him. The original bill of complaint, which was filed August 6, 1924 and under which Stahl was appointed receiver prayed "for the appointment of a receiver to take charge of the books of account of the Sanitarium and collect whatever property or money which may be due said sanitarium". The order of appointment simply recites that the complainants entered their motion for the appointment of a receiver and that the motion came on to be heard and was allowed and Stahl was appointed receiver and fixed his bond at \$1500.00. Giving this order a construction most favorable to appellant, we do not believe Stahl was entitled to any notice of forfeiture, but if there was any defect in the declaration of forfeiture, appellant

possession of the property was in Betina's possession and she knew she was in default and that the contract under which she came into possession of the Sanitarium provided that in case of default, \$500.00 per month was stipulated as reasonable rental for the use and occupancy thereof. The effect of the original bill was to terminate the trust because of insolvency it was impossible to carry out the purpose for which it was created. The evidence disclosed that the Appellate was also insolvent and unable to make the payments or comply with the provisions of the Beardsley-Appellate contract. Certainly after default and under these and other circumstances shown in this record to exist, Beardsley was entitled to receive a fair and reasonable compensation for the use and occupancy of his property while it was being withheld from him, *Clausen v. Clausen*, 279 Ill. 92, *Ryan v. Spenderger*, 284 Ill. App. 308, and we do not think his acceptance of these payments made subsequent to July 23, 1932 waived his declared forfeiture of the Beardsley-Appellate contract. Counsel for appellant further insists that in contemplation of law, Stahl as receiver had possession of this real estate, that his possession was that of the court which appointed him and the notice of forfeiture is fatally defective because not served upon him. The original bill of complaint, which was filed August 6, 1934 and under which Stahl was appointed receiver prayed "for the appointment of a receiver to take charge of the books of account of the Sanitarium and collect whatever property or money which may be due said sanitarium". The order of appointment simply recites that the complainants entered their motion for the appointment of a receiver and that the motion came on to be heard and was allowed and Stahl was appointed receiver and fixed his bond at \$500.00. Giving this order a construction most favorable to appellant, we do not believe Stahl was entitled to any notice of forfeiture, but if there was any defect in the declaration of forfeiture, appellant

ought not be heard to complain, as the Abernethys were the only ones with Whom Beaubien was in privity of contract, and they directed him to execute the Hulse contract, have conveyed, by their quit claim deed, all their interests in the premises to him and are not here complaining.

Assuming that appellant was entitled to file his proposed amendment of July 20, 1933, we are of the opinion that from a consideration of all the evidence in this record, a court of equity would not be warranted in granting the relief now sought by appellant. He has abandoned the offer made in his amended and supplemental bill to pay whatever amount might be found to be due appellee upon this contract, and in his amendment, which the chancellor denied him leave to file, he sought to have appellee return the amounts which appellee had received under this contract, making no offer to pay him anything for the use and occupation of his property. He comes into equity not seeking to do equity. Beaubien did not participate in any profits derived from the sale of these premises at an increased price to Wieland, and on July 31, 1925 there was concededly due appellee \$31,087.05 of which \$1945.24 was for taxes which by the terms of the Beaubien-Abernethy contract the Abernethys were obligated to pay, but had not done so. There was also due him \$303.64 for insurance which he had advanced and which the Abernethys had obligated themselves to pay. At this time they were financially unable to carry out the provisions of this contract, the trust was likewise insolvent and for appellant to now insist that appellee should now refund the payments on this contract without offering to pay him anything for the use of his property for the time the Abernethys or the trust had its use would be most inequitable. We think the decree of the chancellor was supported by the evidence and that it is in accordance with equitable principles and should be affirmed.

DECREE AFFIRMED.

ought not be heard to complain, as the Abernethys were the only ones with whom Besbiden was in privy of contract, and they limited him to execute the Halsas contract, have conveyed, by their quiet claim deed, all their interests in the premises to him and are not here complaining.

Assuming that appellant was entitled to file his proposed amendment of July 30, 1933, we are of the opinion that from a consideration of all the evidence in this record, a court of equity would not be warranted in granting the relief now sought by appellant. He has abandoned the offer made in his amended and unpleaded bill to pay whatever amount might be found to be due appellee upon this contract, and in his amendment, which the chancellor denied him leave to file, he sought to have appellee return the amount which appellee had received under this contract, making no offer to pay him anything for the use and occupation of his property. He comes into equity not seeking to do equity. Besbiden did not participate in any profits derived from the sale of these premises at an increased price to Ireland, and on July 31, 1933 there was concededly due appellee \$31,087.08 of which \$1945.84 was for taxes which by the terms of the Besbiden-Abernethy contract the Abernethys were obligated to pay, but had not done so. There was also due him \$303.64 for insurance which he had advanced and which the Abernethys had obligated themselves to pay. At this time they were financially unable to carry out the provisions of this contract, the trust was likewise insolvent and for appellant to now insist that appellee should now refund the payments on this contract without offering to pay him anything for the use of his property for the time the Abernethys or the trust had its use would be most inequitable. We think the decree of the chancellor was supported by the evidence and that it is in accordance with equitable principles and should be affirmed.

DECEMBER TWENTY-NINTH

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. ELAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

278 I.A. C32³

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 10 1935 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A.D. 1934

General Paint and Varnish

Company,

Appellant,

vs.

Appeal from the Circuit Court

of Lake County

Estate of Harry B. Husted,

Appellee,

DOVE - J,

Appellant filed its claim against appellee in the Probate Court of Lake County, and upon a hearing thereof on December 22, 1931, the claim was disallowed and from that order an appeal was taken by appellant to the Circuit Court. On February 19, 1934, appellee ~~was~~ not being present or represented by counsel, judgment was rendered in the Circuit Court in favor of appellant for \$1134.48. On June 13, 1934, appellee served upon counsel for appellant a copy of her Verified motion, which was afterward and on June 25, 1934 filed in the Circuit Court. This motion sought to vacate the judgment and reinstate the case for trial. Upon a hearing, this motion was allowed and the judgment of February 19, 1934 vacated, and the cause reinstated for trial in the Circuit Court. It is from this order that appellant brings the record to this court for review.

The verified motion of the administratrix of the estate, together with her supplemental affidavit, states that the administratrix received no notice that this cause had been set for trial for February 19, 1934, and it was not until April 16, 1934 that she knew of the rendition of the default judgment; that she employed an attorney of Lake County to represent her as administratrix of said estate, and upon information and belief she states this attorney has

In the Appellate Court of Illinois

Second District

October Term, A.D. 1934

General Taint and Varnish

Company,

Appellant,

Appeal from the Circuit Court

vs.

of Lake County

State of Henry R. Husted,

Appellee,

DOVE - 1.

Appellant filed its claim which was applied in the Circuit

Court of Lake County, and upon a hearing thereof on December 22,

1931, the claim was disallowed and from that order an appeal was

taken by appellant to the Circuit Court. On February 19, 1934,

appellee was not being present or represented by counsel, judgment

was rendered in the Circuit Court in favor of appellant for

\$1134.48. On June 18, 1934, appellee served upon appellant for

appellant a copy of her Verified Motion, which was returned and

on June 25, 1934 filed in the Circuit Court. This motion sought

to vacate the judgment and restate the case for trial. Upon a

hearing, this motion was allowed and the judgment of February 19,

1934 vacated, and the cause reinstated for trial in the Circuit

Court. It is from this order that appellant brings the record to

this court for review.

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together with her supplemental affidavit, states that the administra-

trix received no notice that this cause had been set for trial for

February 19, 1934, and it was not until April 18, 1934 that she

knew of the rendition of the Circuit judgment; that she employed an

attorney of Lake County to represent her as administratrix of said

estate, and upon information and belief she states this attorney has

been disbarred by the Supreme Court from the practice of his profession; that thereafter appearances of other attorneys were entered on her behalf, one of whom advised her that on December 11, 1933, he would appear before the Circuit Court and ask leave to withdraw his appearance; that she was without personal funds and the estate was without cash assets at that time to watch the trial call; that at the time the cause was set for hearing for February 19, 1934, the court directed counsel for appellant to give personal notice to appellee that the cause had been set for trial; that no such notice was ever given; that she believes she has a good defense to the whole of this claim, the nature of her defense being that a recent audit of the books of appellant disclose that the note, which forms the basis of appellant's claim, has been paid in full and that there is no balance due appellant from Harry B. Husted, deceased, but that on the contrary, it appears from receipts and other documentary evidence in the possession of appellee that there is now due appellee as administratrix the sum of \$2750.00 from appellant.

Counter affidavits of Max Shulman and John L. Boyles were filed by appellant. From the affidavit of Boyles, it appears that he is local counsel for appellant and that shortly prior to February 19, 1934 he procured the cause to be set for trial on February 19, 1934, at which time affiant knew appellee had no attorney of record; that the attorney referred to in appellee's affidavit as having been disbarred died more than six months prior to the time this claim was set for trial; that A. C. McHenry and Harry Breger, both attorneys, were in court at the time the case was set for trial, and at that time McHenry asked Boyles if he would notify appellee of the setting, and Boyles promised to do so, but he did not do so, and he has no recollection of being requested by the court to notify appellee; that within one week after the judgment was rendered, McHenry asked Boyles if he had notified appellee that the claim had been set for trial and affiant replied that he had not and affiant so advised the court, and the court stated that there was still time

seen at least by the person who was in possession of his possession; that there was an appearance of counsel attorneys who appeared on her behalf, one of whom advised her that on December 11, 1934, he would appear before the Circuit Court and ask leave to withdraw his appearance; that she was without personal funds and the estate was without cash assets at that time to watch the trial call; that at the time the cause was set for hearing for February 19, 1934, the court directed counsel for appellant to give personal notice to appellee that the cause had been set for trial; that no such notice was ever given; that she believes she has a good defense to the whole of this claim, the nature of her defense being that a recent audit of the books of appellant disclosed that the note, which forms the basis of appellant's claim, had been paid in full and that there is no balance due appellant from Henry B. Husted, deceased, but that on the contrary, it appears from records and other documentary evidence in the possession of appellee that there is now due appellee an administrative sum of \$2500.00 from appellant.

Counsel representatives of Ben Shuman and John H. Boyles were filed by appellant from the office of Boyles, it appears that he is local counsel for appellant and that shortly prior to February 19, 1934, he procured the cause to be set for trial on February 19, 1934, at which time appellant knew appellee had no attorney of record; that the attorney set to it appellant's affidavit as having been dispensed with more than six months prior to the time this claim was set for trial; that A. C. McHenry and Henry Greer, both attorneys, were in court at the time the case was set for trial, and at that time McHenry asked Boyles if he would notify appellee of the setting, and Boyles promised to do so, but he did not do so, and he has no recollection of being requested by the court to notify appellee; that within one week after the judgment was rendered, McHenry asked Boyles if he had notified appellee that the claim had been set for trial and appellant replied that he had not and appellant so advised the court, and the court stated that there was still time

before the term elapsed in which appellee might come in and make her motion. The affidavit of Max Shulman was to the effect that he was the trial attorney for appellant and that the claim of appellant was based upon a note executed by deceased and dated June 24, 1930 for \$2535.00, upon which a credit of \$1680.00 appeared; that he tried the case in the Circuit Court of February 19, 1934 and called as a witness to prove the signature of the deceased to the note upon which the claim was based, the son of the deceased, Granger Husted.

Under the authorities this motion was properly heard upon affidavits and counter affidavits, the motion being treated as the petition or motion for the common law writ of coram nobis and is the commencement of a ^{new} suit in which new issues are made up and the motion stands in the place of a declaration and the proceeding is one at law and independent of the proceeding in which the judgment sought to be set aside was rendered. In order to sustain the motion, it is necessary for the party making it to establish by evidence dehors the record that there was an error of fact and the question presented to the trial court upon the hearing is whether or not there was an error in fact committed in the proceedings which culminated in the rendition of the original judgment and the determination thereof presents purely a question of fact and not of law. Mitchell v. King, 187 Ill. 452; Domitski v. American Linseed Co., 221 Ill. 161; Smyth v. Fargo, 307 Ill. 300; Harris v. Chicago House Wrecking Co., 314 Ill. 500; Jacobson v. Askinaze, 337 Ill. 141.

In the instant case the motion was verified by the administratrix of the estate of Harry B. Husted and served upon the attorney for appellant on June 13, 1934, thereafter appellant on June 25, 1934 filed its counter affidavits. The sufficiency of appellee's motion was not raised in the trial court by any appropriate pleading, such as demurring to it, or by filing a plea of nullo est erratum or by motion to dismiss or by objections to its form

or sufficiency or some other mode to test the validity thereof, and therefore no question of law can arise in this court as to the sufficiency of the motion. Furthermore, the record in this case contains no report of the proceedings and rulings of the trial judge. The praecipe of counsel for appellant directed the Clerk to make up a complete transcript containing a copy of the verdict of the jury and judgment order entered February 19, 1934, copy of appellee's motion to vacate the judgment together with the affidavits and counter affidavits and the order entered by the court in allowing the motion, notice of appeal, proof of service of notice of appeal, notice of appearance by appellee, proof of service of notice of such appearance and a certificate that such is a complete transcript of the proceedings. The certificate of the clerk is that the transcript is complete, true and perfect as requested by the praecipe. Under the former practice act, exceptions could only be preserved by a bill of exceptions, and where a finding and judgment were not mentioned in the bill of exceptions, there was no question presented to an Appellate Court for review except such questions as arose upon the common law record. *Grand Pacific Hotel Co. v. Pinkerton*, 217 Ill. 61.

Treating, however, appellant's counter affidavits as an answer to the motion, the issue raised thereby was purely a question of fact and as no bill of exceptions or its equivalent under the present practice act was ever presented to the trial judge and none incorporated in the transcript of the proceedings which we are reviewing, there is no question appropriately presented to this court for review. *The Central Bond and Mortgage Co. v. Roeser*, 323 Ill. 90.

Notwithstanding the condition of the record, we have given the several contentions of appellant our consideration, assuming that litigants prefer to have the merits of their controversies considered by courts of review rather than technical rules adhered to. It is first insisted that the Circuit Court was without jurisdiction

or affidavits or some other mode to test the veracity thereof, and therefore no question of law was raised in this court as to the sufficiency of the motion. Furthermore, the record in this case contains no report of the proceedings and rulings of the trial judge. The proceeds of counsel for applicant directed the clerk to make up a complete transcript containing a copy of the verdict of the jury and judgment entered on said February 18, 1936, copy of applicant's motion to vacate the judgment together with the affidavits and counter affidavits and the order entered by the court in allowing the motion, notice of appeal, proof of service of notice of appeal, notice of appearance by applicant, proof of service of notice of such appearance and a certificate that such is a complete transcript of the proceedings. The certificate of the clerk is that the transcript is complete, true and correct as requested by the parties. Under the former practice act, exceptions could only be preserved by a bill of exceptions, and where a finding and judgment were not mentioned in the bill of exceptions, there was no question presented to an appellate court for review and such questions as arose upon the common law record. On appeal to the 2d Cir. 1937.

Transcript, however, applicant's counter affidavits as an answer to the motion, the issue raised thereby was purely a question of fact and as no bill of exceptions or its equivalent under the present practice act was ever presented to the trial judge and none incorporated in the transcript of the proceedings which are reviewed, there is no question appropriately presented to this court for review. The District Court and Montana Co. v. Cassel, 323 Ill. 30.

Notwithstanding the condition of the record, we have given the several contentions of applicant our consideration, and find that applicant's prayer to have the merits of their controversy considered by courts of review rather than technical rules applied to. It is first insisted that the Circuit Court is without jurisdiction

to entertain this motion inasmuch as Sec. 89 of the Practice Act of 1907, now Section 72 of the Civil Practice Act of 1933, is applicable solely to common law actions and not to statutory proceedings such as the instant case, and the case of *Burden v. Rissman Lumber and Supply Co.*, 267 Ill. App. 616 is cited as sustaining this contention. That case was a proceeding brought under the Workmen's Compensation Act, a purely statutory proceeding, and is therefore not controlling. We think from a reading of the provisions of Section 72 of the Civil Practice Act that it does embrace proceedings such as the instant case.

In the *People v. Noonan*, 276 Ill. 430, it appeared that a judgment and order of sale against certain real estate for delinquent taxes and special assessments was rendered at the June Term, 1913 of the County Court of Cook County. This judgment was subsequently set aside and on December 5, 1914 another judgment and order of sale was entered. On September 15, 1915, a motion under this Section of the Practice Act was entered, and although the Supreme Court affirmed the order of the County Court denying the motion, the opinion at length discussed the provisions of this section, and there was no intimation in the opinion that its provisions were not applicable. Furthermore, *Weller and Sons v. Berry*, 207 Ill. App. 165 was an appeal from an order of the Circuit Court vacating a previous judgment which it had rendered dismissing an appeal which the administrators of the estate of Celia Lynch had taken from a judgment of the Probate Court which had allowed the claim of *Weller and Sons*, and in *Waldron v. Tarpey*, 234 Ill. App. 287, it appeared that an appeal had been taken to the Circuit Court from an order denying a petition to vacate an order admitting a will to probate. The Circuit Court dismissed the appeal and subsequently a motion was made under Section 89 of the then Practice Act to vacate the order and reinstate the case. While the Appellate Court affirmed the judgment of the trial court, it discussed at length

to enter in this nation income tax. 22 of the statute of 1907, now section 23 of the Civil Practice Act of 1907, is applicable solely to common law actions and not to statutory proceedings such as the instant case, and the case of *Burden v. Burden*, 100 N.Y. 2d 100, 807 Ill. 2d 100, is cited as sustaining this contention. That case was a proceeding brought under the former's compensation act, a purely statutory proceeding, and is therefore not controlling. It is true from a reading of the provisions of section 23 of the Civil Practice Act that it does embrace proceedings such as the instant case.

In the case of *People v. Roman*, 87 N.Y. 2d 430, it was held that judgment and order of sale again, a certain well established for judgment taxes and special assessments was reversed at the June Term, 1911 of the County Court of Cook County. This judgment was subsequently set aside and on December 5, 1911 another judgment and order of sale was entered. On September 15, 1913, a motion under this section of the Practice Act was entered, and although the Supreme Court affirmed the order of the County Court setting aside the motion, the opinion at length discussed the provisions of this section, and there was no intimation in the opinion that the provisions were not applicable. Furthermore, *Weller and Sons v. Henry*, 307 Ill. App. 185 was an appeal from an order of the Circuit Court vacating a previous judgment which it had reversed dismissing an appeal which the administrators of the estate of *William Lynch* had taken from a judgment of the Probate Court which had allowed the claim of *Weller and Sons*, in *Widow v. Tarpey*, 234 Ill. App. 287, it appeared that an appeal had been taken to the Circuit Court from an order denying a petition to vacate an order admitting a will to probate. The Circuit Court dismissed the appeal and subsequently a motion was made under section 23 of the then Practice Act to vacate the order and reinstate the case. While the Appellate Court affirmed the judgment of the trial court, it discussed at length

in its opinion the practice which obtains upon the hearing of a motion under that section of the Practice Act. See also *In Re La Page's Estate v. Devine, Administrator*, 195 Ill. App. 140.

Appellant next insists that appellee's verified motion must be taken most strongly against appellee and as its averments were mostly upon information and belief, it is insufficient to warrant the court in entering the order appealed from. The error of fact upon which it is sought to vacate the judgment and reinstate this cause is that appellee had no attorney of record, her attorney having been disbarred or died, that this fact was known to the attorney for appellant, who promised either the court or another attorney who was an officer of the court, to give appellee notice that the case had been set for trial, that he did not do so and appellee only learned of the rendition of the judgment on April 16, 1934.

We have, therefore, this situation disclosed by the record. On the day that appellant's counsel appeared before the trial judge and had this case set for trial, he knew that appellee's attorney of record was dead and that she had no attorney representing her. Appellee swears that upon information which she believes to be true, the court requested appellant's attorney to give her notice that this case was set for trial and all the attorney says is that he does not recall the court making the request. It is conceded that an officer of the court, that is another attorney, did request appellant's attorney to give such notice, and he promised to do so but failed to keep his promise. The trial court, upon the showing made, allowed appellee's motion, set aside the judgment and reinstated the case. The court therefore was of the opinion that under its rules of practice, appellee was entitled to notice of the setting of the case for trial and the court was not apprised of the fact that no notice thereof had been given appellee. Obviously, if this fact had been known to the court, he would not have rendered judgment against a party who had no notice that her case had been set for trial. That

in its opinion the practice which of course was the basis of a motion under that section of the Rules. See also in the case of *Page's Estate v. Levine*, Administrative, 199 Ill. App. 140. Appellant next insists that appellee's verified motion must be taken most strongly against appellee and as the evidence were mostly in an information and belief, it is insufficient to warrant the court in entering the order appealed from. The error of fact upon which it is sought to vacate the judgment and rehear this cause is that appellee had no attorney of record, but attorney having been disbanded or died, that this fact was known to the attorney for appellant, who examined after the counter another attorney who was an officer of the court, to give appellee notice that the case had been set for trial, that he did not do so and appellee only learned of the rendition of the judgment on April 12, 1934. We have, therefore, this situation disclosed by the record. On the day that appellee's counsel appeared before the trial judge and had this case set for trial, he knew the appellee's attorney of record was dead and that he had no attorney representing him. Appellee sees in that case information which one can have to be true, the court requested appellee's attorney to give her notice that this case was set for trial and all the attorney knew is that he does not recall the court making the request. It is contended that an officer of the court, that is another attorney, did request appellee's attorney to give him notice, and he promised to do so but failed to keep his promise. The trial court, upon the foregoing facts, affirmed appellee's motion, set aside the judgment and reheard the case. The court then gave an opinion that under the rules of practice, appellee was entitled to notice of the setting of the case for trial and the court was not apprised of the fact that no notice thereof had been given appellee. Obviously, if this had been known to the court, he would not have rendered judgment against a party who had no notice that her case had been set for trial. That

appellee had not been notified did not appear of record and we are clearly of the opinion that the trial court, upon the facts as shown by this record, was warranted in entering the order appealed from. Baird and Warner Inc. v. Roble, 250 Ill. App. 255.

The judgment is affirmed.

JUDGMENT AFFIRMED.

appeals had not been notified and no evidence of record was
clearly of the opinion that the trial court, upon the facts as
shown by this record, was warranted in entering the order appealed
from. *East and Garner Inc. v. Folio, 280 Ill. App. 208.*
The judgment is affirmed.

JUSTICE DELANEY.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. ELAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

278 I.A. 632⁴

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 10 1935 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1934

Jack Slifer, Administrator of
the estate of Jack Burt Slifer,
deceased,

Appellee,

vs.

Appeal from the Circuit Court
of Kane County

C. L. Agnew,

Appellant.

HUFFMAN - J.

This was an action brought by appellee against appellant to recover damages for the next of kin of plaintiff's intestate, based upon alleged negligent conduct of appellant as a physician in treating the deceased. It appears by appellant's brief that he is a colored physician. The record discloses that appellant practiced his profession in the City of Aurora, Kane County. The deceased lived in the village of Hinsdale in Du Page County, with his parents, the father being appellee herein. Trial was had before a jury which returned a verdict in favor of appellee for \$1000, upon which judgment was entered by the court, and from which judgment appellant brings this appeal.

The deceased was about ten years old, the child of appellee and wife, and lived in the home with his parents. He was stricken with diphtheria. Appellant was called as the attending physician. He examined the boy's throat and stated that he did not have diphtheria but had tonsillitis. Appellant treated the boy for tonsillitis and left certain prescriptions, which appellee had filled and administered according to appellant's directions. Upon the next examination of the boy by appellant, appellant again stated that the boy did not have diphtheria. Appellant took no culture from the

In the Appellate Court of Illinois

Second District

October Term, A. D. 1904

Jack Oliver, Administrator of

the estate of Jack Oliver, Deceased,

Appellee,

Appeal from the Circuit Court

vs.

of Kane County

O. L. Agnew,

Appellant.

HUTTMAN - 1.

This was an action brought by appellee against appellant

to recover damages for the death of his son, appellant's son,

based upon alleged negligent conduct of appellant as a physician

in treating the deceased. It appears by appellant's brief that he

is a colored physician. The record discloses that appellant practices

his profession in the City of Chicago, Kane County. The deceased

lived in the village of Winfield in Kane County, with his parents,

the father being appellee herein. Trial was had before a jury which

returned a verdict in favor of appellee for \$1000, upon which judg-

ment was entered by the court, and from which judgment appellant

brings this appeal.

The deceased was about ten years old, the child of appellee

and wife, and lived in the home with his parents. He was stricken

with diphtheria. Appellant was called as the attending physician.

He examined the boy's throat and stated that he did not have diph-

theria but had tonsillitis. Appellant treated the boy for tonsil-

litis and left cert in prescriptions, which appellee had filled and

administered according to appellant's directions. Upon the next

examination of the boy by appellant, appellant again stated that the

boy did not have diphtheria. Appellant took no further from the

throat of the boy to determine by laboratory test whether it was diphtheria. The boy continued to grow worse and another physician was called. It was discovered that he was suffering from diphtheria and he died from this cause within a short space of time.

Appellant urges certain grounds for reversal, which have been considered, but which under the state of the record are deemed either insufficient or not well taken at this time. Appellant urges that the declaration does not allege the wrongful act and death to have occurred in the State of Illinois. It appears from the declaration that the appellant was a resident of Kane County, Illinois, and there practiced his profession and there treated the deceased, and that the deceased died because of the negligence of appellant. The evidence amply demonstrated the places of treatment to have been either at appellee's home in Hinsdale where the said child lived, or the office of appellant in the City of Aurora, and the place of death to have been at the home of the child's parents, which was the home of appellee herein. Such alleged defects are cured by verdict, where the issues joined necessarily required proof of the facts defectively stated, and where it cannot be presumed, without such proof, that the court would have permitted a verdict to stand. *Humason v. Michigan Central R.R. Co.* 259 Ill. 462, 466. Appellant also urges that the declaration was defective in its averment that appellee was the duly appointed administrator of the deceased. Appellee instituted this suit as the administrator of the estate of the deceased and concluded the declaration with the statement: "And the plaintiff brings into court here letters of administration to him granted by the Probate Court of Du Page County, Illinois, which gives sufficient evidence to the court of the granting of said administration to the plaintiff." Appellant filed only the general issue to the declaration. The plea of general issue admits the representative capacity in which the plaintiff sues. This question can only be put in issue by special plea. Same not having been raised

threat of the boy to administer a fatal blow to his
diphtheria. The boy continued to grow worse and another physician
was called. It was discovered that he was suffering from diphtheria
and he died from this cause within a short space of time.
Appellant alleges a certain remedy for diphtheria, which has
been considered, but which under the rules of the record are deemed
either insufficient or not well taken at this time. Appellant alleges
that the declaration does not allege the wrongful act and death to
have occurred in the State of Illinois. It appears from the declara-
tion that the appellant was a resident of Kane County, Illinois,
and there practiced his profession and here treated the deceased,
and that the deceased died because of the negligence of appellant.
The evidence amply demonstrated the place of treatment to have
been either at appellee's home in Winnebago where the said child
lived, or the office of appellant in the City of Alton, and the
place of death to have been at the home of the child's parents, which
was the home of appellee's mother. Such alleged defects are cured by
verdict, where the issues joined necessarily required proof of the
facts conclusively stated, and where it cannot be proven, without
such proof, that the court would have permitted a verdict to stand.
Hanson v. Michigan Central R.R. Co., 229 Ill. 482, 486. Appellant also
alleges that the declaration was defective in its averment that appel-
lee was the duly appointed administrator of the deceased. Appellee
instituted this suit as the administrator of the estate of the de-
ceased and concluded the declaration with the statement: "and the
plaintiff brings into court here letters of administration to him
granted by the Probate Court of Kane County, Illinois, which gives
sufficient evidence to the court of the grant of said administra-
tion to the plaintiff." Appellant filed only the general issue to
the declaration. The plea of general issue admits the representa-
tive capacity in which the plaintiff sues. This question can
only be put in issue by special plea. It has not hitherto been raised

in the trial court, cannot now be urged for the first time in a court of review. *Liska v. Chicago Rys. Co.* 318 Ill. 570, 578. Certified copy of letters of administration was introduced in evidence. It is urged the declaration was deficient in averments with respect to due care on the part of the next of kin of said deceased. There is nothing in the evidence to indicate that the parents or next of kin in any way participated in or were connected with the alleged negligent transactions resulting in the injury complained of. Nor does it appear in the pleading that the next of kin in any way participated in the transactions complained of, or in any manner contributed to the death in question. The evidence demonstrates that the next of kin carried out and performed the instructions given them by appellant. While the rule is well established that contributory negligence on the part of the next of kin is a bar to recovery by the administrator under Sec. 1, of the Injuries Act, yet this is a matter of defense. *Holdens v. Schley*, 355 Ill. 545, 547, 549. *Ohnesorge v. Chicago City Ry. Co.* 259 Ill. 424 (and cases cited). No such defense was interposed. This is not an action for wrongful death because of accidental injuries received by the child while in the custody of the parents or other next of kin, wherein the negligence of such next of kin directly contributed to the injuries received. The negligence complained of here is the failure of the appellant to use the ordinary and usual methods and skill common to physicians in that locality, to determine the nature of the deceased's illness and to properly treat and prescribe therefor. The next of kin had nothing to do with the diagnosis of the deceased's illness, except to call appellant as the attending physician. Appellant could not urge negligence on their part in this respect. They had nothing to do with the treatment, except to administer same as directed by appellant. The rule that pleadings will be construed most strongly against the pleader, is reversed after judgment, and the pleading upon which the judgment is based will be liberally

in the trial court, cannot be used for the first time in a court of review. *Wicks v. Wicks*, 100 Ill. 2d 500, 507. Certified copy of the original was introduced in evidence. It is urged the declaration was deficient in averments with respect to the care on the part of the next of kin of said deceased. There is nothing in the evidence to indicate that the parents or next of kin in any way participated in or were connected with the alleged negligent transactions resulting in the injury complained of. Nor does it appear in the pleading that the next of kin in any way participated in the transactions complained of, or in any manner contributed to the death in question. The evidence demonstrates that the next of kin carried out and performed the instructions given them by counsel. While the rule is well established that contributory negligence on the part of the next of kin is a bar to recovery by the administrator and *Wicks v. Wicks*, 100 Ill. 2d 500, 507, yet this is a matter of defense. *Holman v. Holman*, 305 Ill. 445, 547, 549. *Whitcomb v. Chicago City Ry. Co.*, 358 Ill. 424 (and cases cited). No such defense was interposed. This is now an action for wrongful death because of negligent injuries received by the child while in the custody of the parents or other next of kin, wherein the negligence of each next of kin directly contributed to the injuries received. The negligence complained of here is the failure of the parents to use the ordinary and usual methods and skill common to physicians in that locality, to determine the nature of the deceased's illness and to properly treat and prescribe therefor. The next of kin had nothing to do with the diagnosis of the deceased's illness, except to call attention to the attending physician. Appealers could not urge negligence on their part in this respect. They had nothing to do with the treatment, except to administer same as directed by the physician. The rule that pleadings will be construed most strongly against the pleader, is reversed after judgment, and the pleading upon which the judgment is based will be liberally

construed for the purpose of sustaining the judgment. *Plew v. Board*, 274 Ill. 232, 234.

Although a declaration contains no express allegation of due care on the part of the plaintiff, such fact in certain instances may be reasonably inferred by averments stated in an argumentative way. Where the issues have been joined, and after verdict, "the court will intend that every material fact alleged in the declaration, or fairly and reasonably inferable from what is alleged, was proved at the trial, and if, from the issue, the fact omitted and fairly inferable from the facts stated in the declaration, may fairly be presumed to have been proved, the judgment will not be arrested." *Gerke v. Fancher*, 158 Ill. 375, 380. Where no cause of action whatever is stated, the omission is not cured by verdict, but where there is any defect, imperfection or omission in any pleading, either in substance or in form, if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or that the jury would have given the verdict, such defect, imperfection or omission is cured by verdict. *Gerke v. Fancher*, supra, 380, 381. While the declaration in this case is defective, yet we are of the opinion that the pleadings and the evidence combine to show that the injuries complained of were caused by appellant's negligence while the deceased and next of kin were acting according to appellant's directions.

The remainder of appellant's objections are directed toward alleged improper evidence on behalf of plaintiff below, the exclusion of proper evidence offered by defendant below, and the giving of instructions. Appellant tried his own case. We fail to find where appellant interposed any objections to testimony offered by appellee. Nor do we find from an examination of the record that

the court excluded any proper evidence offered by appellant. Appellant offered no instructions. Appellee offered two, which were given. We find no error contained in those instructions.

This suit was begun at the September term, 1931, of the Circuit Court of Kane County. It was not tried until December 18, 1933. It appears that attorneys for appellee prepared and mailed trial notices to appellant or his attorney, upon eighteen occasions between the commencement of the action and the day of trial. Appellant by his attorney filed a plea of general issue to the September term, 1931. This attorney later withdrew from the case. Appellant employed other attorneys who withdrew from the case prior to the trial thereof. On November 29, 1933, appellee's attorneys served notice on appellant that on the 27th day of November, 1933, they had caused this case to be set for hearing for Monday, December 4, 1933. Receipt of this notice is not denied by appellant. The trial of the cause was not reached until December 18th. The defendant at that time was present in person in open court, and stated that he had employed the services of three attorneys in the case, from time to time, but had none at that time. The hearing was continued until the following day, at which time the defendant appeared and tried his own case.

The questions involved in the trial of this case were questions of fact. It is for the jury to weigh and determine the evidence. They see and hear the witnesses and have a superior advantage over a reviewing court in determining the credibility of the witnesses and the weight that should be given their testimony.

In the absence of errors of law, a court of review should not disturb the verdict of a jury unless the same appears to be against the manifest weight of the evidence, or the result of improper motives. From an examination of this case, we are unable to say that any of these conditions existed.

The judgment of the trial court is affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice. 273 I.A. 632⁵

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
JAN 10 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A.D. 1934

Lulu M. Day, Executrix of the

Last Will and Testament of

Dudley W. Day, deceased,

Appellant,

Appeal from the Circuit Court

vs.

of Winnebago County

Grace Forbes Talcott,

Appellee,

HUFFMAN - J.

Appellant instituted suit under the Injuries Act, against appellee in the circuit court of Winnebago County, on January 3, 1933. Demurrer was filed by appellee to this declaration. Subsequently appellant took leave of court to file an amended declaration, which was filed on February 24, 1934. It appeared by both declarations that plaintiff's intestate died on January 15, 1932.

Appellee filed a plea of the Statute of limitations to the amended declaration. Appellant demurred to this plea. The demurrer was overruled and appellant elected to abide the pleadings. The question now before this court is the ruling of the trial court upon the above demurrer.

The position of appellee is that the first declaration filed contained no averment that the plaintiff's intestate was in the exercise of due care, or such allegations by which due care could be reasonably inferred; and that for the first time due care on the part of the decedant was alleged in the amended declaration, which was filed after the tolling of the statute for the bringing of such action. The Injuries Act, Cahill's St. ch. 70, Sec. 2, limits the right to sue thereunder to one year. This statute places a limitation

In the Circuit Court of Minnesota

Second District

Attorney General, et al.

vs. Edna M. Day, Executrix of the

last will and testament of

Truhey W. Day, deceased,

Appellant,

Appellee from the Circuit Court

of Minnesota County

vs.

Grace Thomas Elliott,

Appellee,

MUTTMAN - 1.

Appellant instituted suit under the Injuries Act, against

appellee in the circuit court of Minnesota County, on January 3,

1933. Demurrer was filed by appellee to this declaration.

Subsequently appellee took leave of court to file an amended declaration,

which was filed on February 24, 1934. It appeared by both declarations

that plaintiff's intestate died on January 15, 1931.

Appellee filed a plea of the statute of limitation in the

amended declaration. Appellant demurred to this plea. The demurrer

was overruled and appellant elected to abide the pleadings. The

question now before this court is the ruling of the trial court upon

the above demurrer.

The position of appellee is that the first declaration

filed contained no averment that the plaintiff's intestate was in

the exercise of his care, on such allegations by which one could

be reasonably inferred; and that for the first time one came on the

part of the decedent was alleged in the amended declaration, which

was filed after the tolling of the statute for the bringing of such

action. The Injuries Act, Chapter 25, sec. 20, limits the

right to sue thereunder to one year. This statute places a limitation

not on the defenses to the right of action, but upon the right of action itself. It is a condition of the liability. Bishop v. Chicago Rys. Co. 303 Ill. 273, 277. In an action for damages for death by wrongful act, an allegation that the plaintiff's intestate was in the exercise of due care and caution for his safety at the time, is a necessary and material allegation, and there must be some evidence tending to prove it. Newell v. C.C.C. & St. L. Ry. Co., 261 Ill. 505.

We have examined the original declaration with much care and we do not find wherein it is averred that plaintiff's intestate was in the exercise of due care and caution, or such averments set out by which due care and caution on his part might be reasonably inferred. It is therefore not a question of an original declaration, which stated a cause of action imperfectly and defectively, being amended by the filing of an amended declaration. A declaration in cases of this nature must aver due care and caution upon the part of the deceased, and when it fails to do so, an amended declaration embodying such averment, states a different cause of action, and when not filed until after the lapse of the period of time fixed by the statute for the bringing of such suit, recovery is barred by the statute. A plaintiff in bringing an action under the Injuries Act for wrongful death, must bring himself within the conditions of the act. Bishop v. Chicago Rys. Co. supra Hartray v. Chicago Rys. Co. 290 Ill. 85; Carlin v. Peerless Gas Light Co., 285 Ill. 142; Ross v. C. & A. Ry. Co. 255 Ill. App. 633; Shilling v. Holding, 248 Ill. App. 483.

The order of the circuit court overruling the demurrer to the plea and entering judgment for appellee, was correct, and is therefore affirmed.

Judgment affirmed.

Not on the defense for the right of action, but upon the right of action itself. It is a condition of the liability. Bishop v. Chicago Ry. Co. 200 Ill. 212, 217. In an action for damages for death by wrongful act the plaintiff must establish that the defendant was in the exercise of due care and caution for his safety at the time, in a reasonably and prudent manner, and there must be some evidence tending to prove it. Hewell v. C.C.C. & St. P. Ry. Co. 201 Ill. 508.

[illegible]

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. ELAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 633'

BE IT REMEMBERED, that afterwards, to-wit: On
JAN 17 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1934.

Edna Sanders,

Appellee

vs.

Appeal from the Circuit Court

City of Peoria, a
Municipal corporation,

of Peoria County.

Appellant

DOVE, J.

This is an action by appellee, Edna Sanders, to recover damages for personal injuries suffered from a fall as she was walking on a public sidewalk in the City of Peoria. The cause was tried before a jury, resulting in a verdict against the appellant in the sum of \$5750.00. A remittitur of \$2750.00 was entered by appellee and the trial court rendered judgment in favor of appellee in the sum of \$3,000.00, from which judgment this appeal has been prosecuted.

The evidence discloses that about eleven o'clock on the morning of April 9, 1932, appellee was walking on a public sidewalk on the east side of Olive Street, between South Adams and South Jefferson Streets in Peoria and stepped on a piece of concrete, which gave way and crumbled under her weight, causing her to fall, resulting in a sprained ankle and injuries to her left foot, side and hip. Upon the morning in question, appellee had gone to a store on South Adams Street and passed over this sidewalk on Olive Street, and after she did her marketing, she started to return to her home and had again passed along this sidewalk.

IN THE
COURT OF THE COMMON PLEAS
FOR THE COUNTY OF COLUMBIA

October Term, 1911.

John Sanders,

Appellee

vs.

Robert from the Western Coast

of Berlin County.

City of Berlin, a
Municipal Corporation,

Appellant

DOVE, J.

This is an action by and against the defendant, to recover damages for personal injuries sustained by the plaintiff while walking on a public sidewalk in the City of Berlin. The case was tried before a jury, resulting in a verdict against the defendant in the sum of \$1000.00. A remittitur of \$750.00 was entered by the court and the trial court rendered judgment in favor of the plaintiff in the sum of \$250.00, from which judgment this appeal has been prosecuted.

The evidence disclosed that about eleven o'clock in the morning of April 8, 1908, the plaintiff was walking on a public sidewalk on the east side of Olive Street, between South Adams and South Jefferson Streets in Berlin and stepped on a piece of concrete, which gave way and crumbled under her weight, causing her to fall, resulting in a sprained ankle and injuries to her left foot, side and hip. Upon the morning in question, the plaintiff went to a store on South Adams Street and passed over this sidewalk on Olive Street, and after she did her marketing, she started to return to her home and had again passed along this sidewalk.

She discovered she had left some articles at the store on South Adams Street, where she had been trading, and was on her way back to that store and was passing along the sidewalk for the third time that morning when the accident occurred. She was accompanied by her twelve year old son, who was pulling a coaster wagon. The sidewalk was of cement, seven or eight feet in width, constructed at least ten years previous to the time of the accident and while at the place of the injury there was no regular drive way, still heavy trucks had used the sidewalk to such an extent that as several witnesses expressed it, the concrete had become all broken up. The evidence further disclosed that when original constructed a light coat of cinders was used for the base and the concrete was not to exceed one inch in thickness and was of poor grade. After appellee fell, she was able to return to her home with the aid of her son, by placing her injured leg in the coaster wagon.

At the conclusion of the evidence, appellee made a motion for an instructed verdict, the court, however, reserved his decision thereon and the cause was submitted to the jury, resulting in a verdict and judgment as stated above.

It is first contended that the court erred in not directing a verdict for appellant. Counsel concedes that the proof disclosed that the sidewalk was not in a good state of repair, but insists that the burden of proof was on appellee to further prove that the place where the accident happened was dangerous in itself. Various cases from other jurisdictions are cited, as well as *Boender v. City of Harvey*, 251 Ill. 228; *City of Quincy v. Barker*, 81 Ill. 300; and *City of Aurora v. Pulfer*, 56 Ill. 270.

In *City of Aurora v. Pulfer*, supra, it appeared that the plaintiff sustained a broken leg while attempting to climb a fence, which had been erected by an adjoining property owner who denied the existence of a public highway at the place where the accident occurred. The court in holding the city not liable, said that it was not alleged that the fence was insecure or that it gave way causing the injury,

but that the injury was the result of the merest accident as the fence was not, in its character, a dangerous obstruction to anyone passing on foot as anyone approaching it would be fully advised of the nature of the obstruction and that it was wholly unlike a defect in a sidewalk that could not be readily detected. "The obstructions or defects in the streets or sidewalks of a city, to make the corporation liable," continued the opinion, "must be of such a nature that they are in themselves dangerous, or such that a person, exercising ordinary prudence, cannot avoid danger or injury in passing them; in general, such defects as cannot be readily detected. *** If the injury is the combined result of an accident and a defect in the street or walk, and the accident would not have occurred but for such defect, and the danger could not have been foreseen or avoided by ordinary care and prudence, then such a corporation will be liable to the party injured."

In *Boender v. City of Harvey*, supra, it appeared that a milkman tripped over a stone near the side of a street when running from his wagon to a nearby house to deliver milk. The court held there could be no recovery stating however that no arbitrary rule could be laid down as to defects in highways or streets for which municipalities will be liable, that the object to be secured is reasonable safety for travel considering the amount and kind of travel which may fairly be expected upon the particular road or street, that the only duty cast upon the city is that it shall use reasonable care to keep its streets reasonably safe for ordinary travel by persons using due care and caution, and that when an injury is caused by a defect in a street, resulting from a failure of a city to repair, the city is not liable unless it had notice of the defect or of such facts and circumstances as would by the exercise of reasonable diligence lead a prudent person to such knowledge.

but that the injury was the result of the negligent conduct of the
lance was not, in the absence of a showing of negligence, to be
one leading to the conclusion that it was the result of the
violation of the duty of the defendant and that it was
unlike a defect in a structure which could not be readily
"The construction of defects in the structure of a building
city, to make the construction liable," would make the building
"that is of such a nature that it is the result of the
or such that a person, exercising ordinary prudence, could
avoid danger or injury, as in the case of a building, from which
as cannot be readily avoided. *** In the injury to the building
result of an accident and a defect in the structure of the
accident would not be the result of such defect, and the
danger could not have been avoided by the exercise of
and prudence, then the construction will be liable to the party
injured."

In *Boender v. City of New York*, 170 N.Y. 211, 70 N.E. 211, 10
Milkman tripped over a stone near the curb of a street where
from his wagon to a nearby house to deliver milk. The court held
there could be no recovery, stating, however, that in ordinary life
could be laid down as to defects in pavements or streets for which
municipalities will be liable, that the defect to be secured is
reasonable safety for travel concerning the amount and kind of
travel which may fairly be expected upon the particular road or
street, that the only duty cast upon the city is that it shall
use reasonable care to keep its streets reasonably safe for ordinary
travel by persons using due care and caution, and that when an
injury is caused by a defect in a street, resulting from a failure
of a city to repair, the city is not liable unless it had notice of
the defect or of such facts and circumstances as would put the
exercise of reasonable diligence upon a prudent person to such
knowledge.

In *City of Quincy v. Barker*, supra, the plaintiff was injured through slipping upon a ridge of ice in the center of the walk. The court reversed a judgment for the plaintiff because it appeared there was ample space left on either side of the ridge for plaintiff, in the exercise of reasonable care, to have passed.

The law upon the question of the liability of a municipality for injured sustained by one who uses its public sidewalks has been frequently stated. A city is not bound to keep its sidewalks absolutely safe for pedestrians, nor is it required to keep them in a reasonably safe condition. All that is required of a municipality is to use reasonable care to keep its sidewalks reasonably safe for ordinary travel thereon by persons using due care and caution for their own safety. *Molway v. City of Chicago*, 239 Ill. 486; *City of Salem v. Webster*, 192 Ill. 369; *Village of Lockport v. Licht*, 221 Ill. 35; *Hanrahan v. City of Chicago*, 289 Ill. 400; *Brennan v. City of Streator*, 256 Ill. 468; *City of Rock Island v. Gingles*, 217 Ill. 185.

In the instant case, the evidence tended to prove that this cement walk was laid more than ten years ago, that the cement used was of an inferior grade and it was not properly constructed, that its base was not gravel, but cinders, that it was from three-fourth's of an inch to not to exceed one inch in thickness, that many years ago it began to crumble and break up and no repairs had ever been made upon it. It further appeared that appellee lived not far away and was familiar with this condition, and upon the morning in question she avoided stepping on cracks or pieces which might cause her to trip or fall, but did step upon a piece of concrete which appeared to be sound, but which had bulged up, leaving a hollow space beneath, that it gave way under her weight, there being nothing underneath to give it support, and as a result thereof, she was injured. Without objection one witness who lived nearby expressed his conclusion that at the place where appellee was injured, the walk had been impassable for women and children for a long time, as the surface was rough and uneven and pieces of concrete were loose and would break and give way whenever

stepped upon, and that his daughter had also fallen at this place. From this evidence, the jury were warranted in finding that appellee was in the exercise of due care for her own safety and that she had no notice that the concrete upon which she stepped would break if she did step upon it, and that she had a right to assume that this portion of the walk was safe. As a matter of fact, it was dangerous to anyone, because there was nothing beneath the concrete to support it, and the proximate result of its breaking was to cause appellee, who stepped upon it, to fall. The jury were also warranted in finding from the evidence that inasmuch as this condition had existed for many years, that no repairs had ever been made by appellant and from all the other facts and circumstances in evidence, that appellant was chargeable with notice thereof. Under the authorities, it was a question of fact whether this place where appellee was injured had remained in such condition for such length of time as to charge the city with notice and whether appellee was guilty of contributory negligence was also a question of fact for the jury. Appellant offered no testimony, and in our opinion the trial court did not err in refusing appellant's peremptory instruction.

At the conclusion of the evidence, the record discloses that the court, in chambers, in conference with the attorneys, went over the instructions which the court proposed to give to the jury. That counsel for appellant stated he had no objection to what the court proposed to give, but requested that the following additional instruction be added: **If** the jury believe from the evidence that there was a dangerous defect in the sidewalk where the injury sued for is alleged to have occurred, still if plaintiff knew of the condition of the sidewalk alleged to have caused the injury, she is entitled to recover only in case the jury find from the evidence that she was passing along the sidewalk carefully and thoughtfully with intent to avoid the danger which she knew was in the way. And if the jury believe from the evidence that plaintiff knowing of the alleged dangerous condition of the sidewalk was passing thereon carelessly, recklessly

stepped upon, and that his daughter had also fallen at this place. From this evidence, the jury were warranted in finding that the appellee was in the exercise of due care for her own safety and that she had no notice that the concrete was thin and she stepped upon it. The appellee did step upon it, and that she had a right to assume that the portion of the walk was safe. As a matter of fact, it was dangerous to anyone, because there was a hole beneath the concrete at support it, and the proximate result of its breaking, was to cause appellee, who stepped upon it, to fall. The jury were also warranted in finding from the evidence that inasmuch as this condition had existed for many years, that no repairs had ever been made by appellant and that all the other facts and circumstances in evidence, that appellant was chargeable with notice thereof. Under the instruction, it was a question of fact whether this place where appellee was injured was contained in such condition for such length of time as to charge the city with notice and whether appellee was guilty of contributory negligence was also a question of fact for the jury. Appellant offered no testimony, and in our opinion the trial court did not err in refusing appellant's peremptory instruction.

It is the conclusion of the evidence, the record discloses that the court, in chambers, in conference with the attorneys, went over the instructions which the court proposed to give to the jury. That counsel for appellant stated he had no objection to what the court proposed to give, but requested that the following additional instruction be added: All the jury believe from the evidence that there was a dangerous defect in the sidewalk where the injury was done and that it was alleged to have occurred, will it plaintiff know of the condition of the sidewalk alleged to have caused the injury, she is entitled to recover only in case the jury find from the evidence that she was passing along the sidewalk carefully and thoughtfully with intent to avoid the danger which she knew was in the way. And in the jury believe from the evidence that plaintiff knowing of the alleged dangerous condition of the sidewalk was passing thereon carelessly, recklessly

or without thought of such dangerous condition or caution to avoid it and safely pass over it, then the jury must find for the defendant." The charge which the court gave the jury properly defined negligence, told the jury that the burden of proof was upon the plaintiff and then proceeded: "One of the material allegations of the plaintiffs declaration, and each count thereof, is that at the time of the accident in question and immediately prior thereto, she was in the exercise of ordinary care for her own safety. If you believe from the greater weight of all the evidence that the plaintiff exercised that degree of care and caution commensurate with her knowledge, if any, of her surroundings at the time of the accident in question, for her own personal safety, at and immediately prior to the injury in question that an ordinarily careful and prudent person would have exercised under the same or similar circumstances, then the plaintiff was in the exercise of due care. The plaintiff is not required to prove that any officer or agent of the defendant, the City of Peoria, had actual notice of the condition of the sidewalk in question at the time in question, but if you find from a preponderance of the evidence that the sidewalk in question was located within the City of Peoria, and that the said sidewalk at the place in question was unsafe and defective, and that plaintiff, with all due care and caution for her own safety, was at the time and place in question, injured by reason of such unsafe and defective condition, and if you further believe that a sufficient length of time had elapsed between the time when the said sidewalk became defective, if shown, and the date of the injury to plaintiff, for the City of Peoria, by the exercise of reasonable care and diligence to have discovered and repaired such defect or unsafe condition in said sidewalk, if any, then and in that state of the proof the said City of Peoria was negligent in not discovering and repairing the said sidewalk, if you find from a preponderance of the evidence that the same was defective. It is the duty of a city in this state to use reasonable

or without them, of which the jury is to decide, to avoid it and safely pass over it, then the jury must find the defendant. The charge which the court gave the jury over the defendant negligence, that the jury that the burden of proof was upon the plaintiff and that proceeded: "One of the material allegations of the plaintiff's declaration, and also every fact, is that at the time of the accident in question and immediately prior thereto, and was in the exercise of ordinary care for her own safety. If you believe from the greater weight of all the evidence that the plaintiff exercised due care and caution commensurate with her knowledge, if any, of the circumstances at the time of the accident in question, for her own personal safety, at and immediately prior to the injury in question that an ordinarily careful and prudent person would have exercised under the same or similar circumstances, then the plaintiff was in the exercise of due care. The plaintiff is not required to prove that any officer or agent of the defendant, the City of Peoria, had actual notice of the condition of the sidewalk in question at the time in question, but if you find from a preponderance of the evidence that the sidewalk in question was located within the City of Peoria, and that the said sidewalk at the place in question was unsafe and defective, and that plaintiff, with all due care and caution for her own safety, was at the time and place in question, injured by reason of such unsafe and defective condition, and if you further believe that a sufficient length of time had elapsed between the time when the said sidewalk became defective, if known, and the date of the injury to plaintiff, for the City of Peoria, by the exercise of reasonable care and diligence to have discovered and repaired such defect or unsafe condition in said sidewalk, if any, then and in that state of the proof the said City of Peoria was negligent in not discovering and repairing the said sidewalk, if you find from a preponderance of the evidence that the same was defective. It is the duty of a city in this state to use reasonable

care and diligence to keep its sidewalks in a reasonable safe condition for public travel by those who are in the exercise of ordinary care for their own safety; that if a sidewalk remains in an unsafe condition for a considerable length of time, and such length of time that the city authorities, in the exercise of ordinary care and diligence, should have discovered such condition and remedied it, then notice to the City of such defective or unsafe condition, if any, of such sidewalk is presumed. The law does not require the city to respond in damages for every injury that may be received on a sidewalk. The defendant is only liable for such defects in its sidewalks as are in themselves dangerous, or such that a person exercising reasonable care and caution cannot avoid danger in passing over them. If the jury believe from the evidence that the defect in the sidewalk in question was not in itself dangerous to the safety of a person passing over it with reasonable care and caution, and that the alleged injury was the result either of a mere accident without negligence on the part of defendant, or that it resulted from a want of reasonable care and caution on the part of the plaintiff, then the jury should find the defendant not guilty. It is the duty of persons traveling over the sidewalks of a City to use ordinary care to avoid defects which are obvious or could be discovered by the exercise of ordinary care on their part, and if the jury believe from the evidence that plaintiff by the exercise of ordinary care could have avoided or passed over the defect, if any, which it is alleged caused the injury, the plaintiff can not recover."

In our opinion, the charge as given embraced everything that was proper in the suggestion of counsel. There was no evidence that plaintiff knew of the condition of this concrete which gave way and caused her to fall, nor is there any evidence that she passed thereon carelessly or recklessly and the use of those terms would be misleading and confusing to the jury, Wallace v. City of

care and diligence to keep the sidewalks in a reasonably safe condition for public travel by those who are in the exclusive of ordinary care for their own safety; that it is a violation of the law in an unsafe condition for a considerable length of time, and such length of time that the city authorities, in the exercise of ordinary care and diligence, should have discovered and remedied it, and remedied it, then waived to the duty of such defective or unsafe condition, if any, of such sidewalk is alleged. The law does not require the city to respond in damages for every injury that may be received on a sidewalk. The defendant is only liable for such defects in its sidewalks as are in the sidewalks, or any other person exercising reasonable care and caution cannot avoid liability by passing over them. If the jury believe from the evidence that a defect in the sidewalk in question was not in itself dangerous to the safety of a person passing over it with reasonable care and caution, and that the alleged injury was the result either of a mere accident without negligence on the part of defendant, or that it resulted from a want of reasonable care and caution on the part of the plaintiff, then the jury should find the defendant not guilty. It is the duty of persons traveling over the sidewalks of a city to use ordinary care to avoid defects which are obvious or could be discovered by the exercise of ordinary care on their part, and if the jury believe from the evidence that plaintiff by the exercise of ordinary care could have avoided or passed over the defect, if any, which is alleged to be the injury, the defendant can not recover.

In our opinion, the issues as given embraced everything that was proper in the suggestion of counsel. There was no evidence that plaintiff knew of the condition of this concrete walk at any time and caused her to fall, nor is there any evidence that she passed thereon carelessly or recklessly and the use of those words would be misleading and contrasting to the jury, Wallace v. City of

Farmington, 231 Ill. 232.

It is finally insisted that the verdict of the jury was excessive. The trial court so considered it and ordered a remittitur of \$2750.00 and rendered judgment for \$3,000.00. The evidence discloses that appellee suffered injuries to her side, hip and that the external lateral ligaments of the ankle joint were sprained. The testimony is that such an injury is painful and Dr. Easton testified that they were permanent. She is a housewife, fifty-five years of age. The trial was had approximately two years after the injuries were received and the jury and trial court were in a far better position than this court to pass upon the amount of the damages appellee sustained. The Appellate Court of the First District affirmed a judgment for the same amount for a similar injury. *Weifenbach v. White City Construction Co.*, 201 Ill. App. 521.

Finding no reversible error in this record, the judgment is affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

278 I.A. 633²

BE IT REMEMBERED, that afterwards, to-wit: On
JAN 17 1935 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1934

Charity Eckhardt,

Appellee,

vs.

Appeal from the Circuit Court

of Henderson County

Village of Lomax,

Appellant.

DOVE - J.

This is an action instituted by Charity Eckhardt, appellee, against the Village of Lomax, to recover for personal injuries. A trial resulted in a verdict for \$300.00, upon which judgment was rendered and the record is brought to this court for review by the defendant in the lower court, appellant in this court.

The evidence discloses that appellee is a housewife, sixty-five years of age, and has lived in the Village of Lomax for fifty years and for twenty or twenty-one years had lived in the same house on Jefferson Street where she was living at the time of her accident. About 10:00 o'clock on the morning of April 7, 1932, appellee was walking from the business section of town to her home. There was a concrete walk, three feet wide, running the entire length of the block north and south on the east side of the street, (which was across the street) from appellee's home. It was raining and instead of proceeding north to the corner opposite her house and then turning west on the concrete crossing, she left the sidewalk and started in a diagonal direction across the street to her home. There was a ditch running parallel with the sidewalk about three feet west of the edge of the sidewalk. This ditch did not exceed a foot in depth and at the place where the accident occurred, the ditch was covered

In the Appellate Court of Illinois

Second District

October Term, A. D. 1934

Charity Schmidt,

Appellee,

(Appar) from the Circuit Court

vs.

of Henderson County

Village of Lomax,

Appellant.

LOVE - 1.

This is an action instituted by Charity Schmidt,

appellee, against the Village of Lomax, to recover for personal

injuries. A trial resulted in a verdict for \$30.00, upon which

judgment was rendered and the record is brought to this court for

review by the defendant in the lower court, appellant in this

court.

The evidence discloses that appellee is a housewife,

sixty-five years of age, and has lived in the Village of Lomax

for fifty years and for twenty or twenty-one years has lived in

the same house on Jefferson Street where she was living at the

time of her accident. About 10:00 o'clock on the morning of

April 7, 1932, appellee was walking from the public station of

town to her home. There was a concrete walk, three feet wide,

running the entire length of the block north and south on the

east side of the street, (which was across the street) from

appellee's home. It was raining and instead of proceeding north

to the corner opposite her home and then turning west on the

concrete crossing, she left the sidewalk and entered in a diagonal

direction across the street to her home. There was a ditch

running parallel with the sidewalk about three feet west of the

edge of the sidewalk. This ditch did not exceed a foot in depth

and at the place where the accident occurred, the ditch was covered

by stringers and upon these stringers several 2 X 10 planks had been laid, making what is spoken of in the record as a culvert. This culvert was built in 1926 or 1927 in order that an adjoining lot owner on the east of the street might drive his automobile from the street across the ditch and sidewalk onto his lot lying immediately east of the sidewalk. Sometime in the winter of 1931 or 1932 one of these planks became broken and as appellee stepped on the short end of a broken plank which covered the culvert, it gave way and she fell, as a result of which her left arm was broken.

It is first insisted that the court erred in admitting in evidence a written notice to the Village to the effect that appellee had sustained injuries and that she expected to institute this suit to recover damages for the injuries she sustained. The record discloses that this notice was addressed to the Village of Lomax and was dated September 17, 1932 and attached thereto is the following: "I personally served within writ upon within Village of Lomax by reading same to William Bradford, Clerk of said Village of Lomax and at the same time and place delivered him a true copy as herein commanded this 22nd September, 1932. E. L. Davenport, Sheriff." Mr. Davenport testified that he was Sheriff at the time the notice was served and had been since December, 1930; that he knew William Bradford and that the return was correct. While he was on the witness stand testifying, he was asked this question: "And you served a copy of that instrument on William Bradford?", and without objection answered in the affirmative, and he was then asked: "As Village Clerk of the Village of Lomax?", and again without objection answered in the affirmative. The evidence further disclosed that William Bradford was Village Clerk on September 22, 1932. In addition to the return of the sheriff there also appears the following endorsement upon this notice: "I hereby acknowledge service of above and within notice by service of copy

by witnesses and upon these findings several J. I. O. plans had been laid, making what is spoken of in the record as a conflict. This culvert was built in 1930 or 1931 in order that an adjacent lot owner on the east of the street could drive his automobile from the street across the lot and alongside onto his lot lying immediately east of the street. One of these plans became known and as specified of 1931 or 1932 one of these plans became known and as specified stepped on the north end of a broken pipe which covered the culvert, it gave way and the fall, as a result of which the lot was broken.

It is the intention of the court that in settling

in evidence a written notice to the Village to the effect that the Village had sustained injuries and that the expense to the Village this suit to recover damages for the injuries and expenses.

The record discloses that this notice was addressed to the Village of Lomax and was dated September 14, 1932 and attested thereto is

the following: "I personally served within and upon within Village of Lomax by mailing same to William Bradford, Clerk of said Village of Lomax and at the same time and place delivered him a true copy

as herein contained and attested, dated, 1932, W. L. J. Verger,

"Sherrill". Mr. Verger testified that he was present at the time

the notice was served and was present since December, 1930; that he

knew William Bradford and that the return was correct. While he

was on the witness stand testifying, he was asked this question:

"And you served a copy of that instrument on William Bradford?"

and without objection answered in the affirmative, and was then

asked: "As William Bradford of the Village of Lomax?" and again

without objection answered in the affirmative. The evidence further

discloses that William Bradford was Village Clerk of Lomax

in 1932. In addition to the return of the sheriff there also

appears the following endorsement upon this notice: "I hereby

acknowledge service of above and within notice by service of copy

this 19th September 1932. Frederick H. Lauder, Village Attorney". The evidence further disclosed that this signature of Frederick H. Lauder was genuine, and he was the Village Attorney and appears in this court as attorney for appellant. It is conceded that the contents of the notice embraced the statutory requirements, but appellant's position is that there was no competent evidence to show either that the notice was ever delivered to the Village Clerk or filed in his office. In support of this contention Ball v. Peck, 43 Ill. 482, and Vennum v. Vennum, 56 Ill. 430 are cited. In the Vennum case the court, in speaking of the return of Thompson, a constable, on a notice or demand to quit and deliver up possession of the premises involved, said: "Thompson's endorsement was wholly insufficient to prove delivery of a copy. Proof of the handwriting did not aid in the slightest degree. No endorsement upon the paper, either by an officer or by a private person, whether sworn to or not, that a copy had been delivered constituted proof of such fact. * * * Thompson who it is assumed served the demand on appellant, to whom a copy should have been given, might have been called to prove that the law had been complied with." In the Ball case, supra, the court stated that the person who served the instrument should be called as a witness. In the instant case this was done. Davenport, the Sheriff who served the notice and subscribed to the return, testified as a witness, and while the statute required this notice to be filed in the office of the City Attorney and City Clerk, still under the authorities we are clearly of the opinion that the provisions of the statute in the instant case were complied with. Richmond v. City of Marseilles, 190 Ill. App. 227; Wolf v. City of Venice, 152 Ill. App. 585. Furthermore, the objection made to the admission in evidence of this exhibit was general and not specific and for that reason there was no error in the ruling of the trial court.

It is next contended that appellee was guilty of such

contributory negligence as barred a recovery, it being insisted that the evidence does not disclose that there was any invitation, express or implied, upon the part of appellant, for appellee to leave the sidewalk and use this culvert for sidewalk purposes. In support of this contention, appellant cites *White v. City of Chicago*, 120 Ill. App. 607; *Brown v. City of Chicago*, 135 Ill. App. 126; *City of Centralia v. Krouse*, 64 Ill. 19, and *Waterbury v. C. M. & St. P. Ry.*, 207 Ill. App. 375. We have examined these cases and read the evidence in this record, and inasmuch as the judgment must be reversed for erroneous instructions, we will not discuss the weight of the evidence upon this question. The record does disclose, however, that appellant built this culvert several years before the accident happened and no repairs had been made thereon. Appellee and other members of her family frequently used this culvert in crossing the street at this point, and other witnesses testified that they had used it in crossing and had seen others do the same. From this testimony and other facts and circumstances in evidence, we are of the opinion no error was committed by the trial court in submitting the case to the jury.

It is next insisted that the trial court erred in refusing to give the following instruction tendered by appellant, viz: "You are instructed that if you believe from the evidence before you that the place where the accident occurred was more dangerous than ordinary sidewalks and that the plaintiff knew of such condition, then she was bound to use more than ordinary care and diligence to avoid accident; and if in such case she failed to use such care and diligence in proportion to the danger she can not recover". This identical instruction was tendered to the trial court in the case of *the President and Board of Trustees of the Town of Harvard v. Senger*, 34 Ill. App. 223. The trial court refused the instruction and the Appellate Court, in commenting upon such refusal observed that it stated the law correctly and that it was error to refuse it. In the instant case the eighteenth

given instruction on behalf of appellant told the jury "that before appellee could recover, she must show by a preponderance of the evidence that she was at the time of the accident complained of, using all the care and diligence that a reasonable person would ordinarily use in passing over a place of the kind described by the witness", and by the fourteenth given instruction of appellant, the jury were told that if they believed from the evidence that the plaintiff was injured by stepping on a decayed, rotten or broken plank in the culvert and that prior to receiving her injury she had knowledge thereof, that then the jury should take those facts into consideration in determining whether at the time the plaintiff was injured she was in the exercise of reasonable, ordinary prudence and caution for her own safety. The thirteenth given instruction of appellant also told the jury that before appellee could recover, she must "prove by a preponderance of the evidence that she was using, at the time of the accident, all the care and diligence that a reasonable person would ordinarily use in passing a place of that description", and the nineteenth instruction given at the request of appellant made it one of the conditions of recovery for appellee "to prove by a preponderance of the evidence that she was guilty of no negligence upon her part which contributed to said injury and was at the time of said injury, if any was sustained, in the exercise of ordinary care and caution to avoid being injured".

It is the law, as stated in *Swalm v. City of Joliet*, 219 Ill. App. 123, that one who uses a public street and is familiar with its conditions must use reasonable care in proportion to the danger, if any, known to him. And if one knows of the dangerous condition of a sidewalk, that fact would call for the exercise of a greater amount of care than would be required in the absence of such knowledge, and a defendant is entitled to have the jury instructed that the plaintiff should be held to that degree of care

It is the duty of the State to protect the rights of its citizens and to maintain the peace and order of the State.

stated that the plaintiff should be held to that degree of care such knowledge, and a defendant is entitled to have the jury in a greater amount of care than would be required in the absence of condition of a sidewalk, that that would call for the exercise of danger, if any, known to him. It is one thing to say that a defendant with its conditions must use reasonable care in prevention so far as the plaintiff. App. 198, that one who uses a public street and the plaintiff.

which was commensurate with his or her knowledge of the danger.

In the instant case, the tendered instruction left it to the jury to determine how dangerous ordinary sidewalks were, and using that as a standard for comparison, then determine how dangerous the place was where the accident occurred. Appellee, under the law was never required to use more than ordinary care and diligence to avoid injury. It is true that what is ordinary care depends upon circumstances and situations, but this instruction, if given, would have required her to use under certain conditions more than ordinary care. That is not the law. *City of Bunker Hill v. Pearson*, 46 Ill. App. 47. Under the facts as disclosed by this record, we are of the opinion that the jury was fully and properly instructed in this particular and no reversible error was committed by the trial court in refusing this instruction.

It is next insisted that the court erred in its given instructions on behalf of appellee. Instruction No. 2 told the jury that "actual notice of a defect or obstruction is not required where a defect has existed for such a period of time that the authorities by exercise of ordinary care, could have discovered and remedied it." This was in a measure an abstract proposition of law and might be understood by the jury as assuming the existence of a defect or obstruction. There was no evidence in the record of any obstruction and this instruction should have been refused. Instruction No. 4 told the jury that appellant was under the legal duty of keeping its streets and sidewalks in a reasonable safe condition for travel. By instruction No. 5 the jury were told that it is the duty of appellant "to keep such part of its public streets as are commonly used by foot passengers as a sidewalk, with the knowledge of said village that the same are so used and have been for a long period of time in a reasonably safe condition and repair for the safety of persons who have occasion to pass over the same." This instruction could be understood by the jury as assuming that this street where appellee was injured was commonly used

by foot passengers as a sidewalk, that it had been so used with the knowledge of appellant for a long time and that it was the duty of appellant to keep it in a reasonably safe condition. Instruction No. 8 told the jury that it was the duty of appellant "to keep and maintain the street in question reasonably safe for such use as streets are ordinarily and reasonably intended or used for."

The law upon the question of the liability of a municipality for injuries sustained by one who uses its public streets has been frequently stated. A city is not bound to keep its streets absolutely safe, nor is it required to keep them in a reasonably safe condition. All that is required of a municipality is to use reasonable care to keep its streets reasonably safe for ordinary travel thereon by persons using due care and caution for their own safety. ⁴⁸⁶ Molway v. City of Chicago, 239 Ill. ~~486~~; City of Salem v. Webster, 192 Ill. 369; Village of Lockport v. Light, 221 Ill. 35; Hanrahan v. City of Chicago, 289 Ill. 400; City of Rock Island v. Gingles, 217 Ill. 185. In commenting upon an instruction which told the jury that it was the duty of the city imposed by law to keep its streets in a reasonably safe condition for persons walking and driving upon them, the court in City of Rock Island v. Gingles, supra, said: "It places an absolute duty on the city to keep its streets reasonably safe and in this respect was erroneous. We have held in an unbroken line of cases, beginning with City of Rockford v. Hildebrand, 61 Ill. 155, and continued down to City of Salem v. Webster, 192 Ill. 369, that a city is only required to use reasonable care and diligence to keep its streets in a reasonably safe condition and repair for travel, and that when it has exercised that degree of diligence, it is not liable for injury sustained on account of defects or obstructions in the same".

Instruction No. 6 recognized the true rule as it told the jury "that it is the duty of a village in this state to use reasonable care to keep its streets in a reasonably safe condition for public travel, by those who are in the exercise of ordinary care for

their own safety." While appellant insists that the latter part of this instruction is objectionable, still it was approved in *Graham v. City of Rockford*, 238 Ill. 214, 217.

In the instant case, appellant is not in a position to complain of that portion of appellee's instructions which stated that it was the duty of appellant to keep its streets and sidewalks in a reasonably safe condition for pedestrians, as by its instructions No. 12, 16 and 17 the same obligation was laid upon appellant.

Appellee insists that inasmuch as the procedure outlined in the Civil Practice Act with reference to the manner of instructing the jury was not followed, appellant has therefore waived its right to question the correctness of the instructions. While there is nothing in the record to show that the parties stipulated that the court should instruct under the former practice, still as a matter of fact that was done. The record discloses that at the conclusion of the evidence counsel for the respective parties submitted instructions to the court in accordance with the practice prior to January 1, 1934 and the court appropriately marked them either "given" or "refused" and read the given instructions to the jury, in accordance with the former practice. The record further discloses that to the giving of each instruction tendered by appellee, exception was taken by appellant, and we are of the opinion that to hold that appellant is not now in a position to question the correctness of the court's rulings upon the instructions would be manifestly unfair.

It is finally insisted that the verdict was excessive, but inasmuch as this case must again be tried, there is no necessity for us to discuss this contention.

For the errors indicated, the judgment of the Circuit Court is reversed and this cause remanded.

Reversed and Remanded.

their own safety." While the court said that the jury was

of this instruction is objectionable, still it was approved in

James v. City of New York, 100 N.Y. 211, 214.

In the instant case, according to the position to

conduct of the position of the instruction which stated

that it was the duty of the jury to accept the facts and circumstances

in a reasonably safe condition for consideration, as by the instruction

given on 12, 13 and 14 the same obligation was laid upon the jury.

Appellate division that because of the procedure outlined

in the civil practice act with reference to the manner of questioning

the jury was not allowed, a well known rule of procedure which the court

to question the testimony of a witness. While there is

nothing in the record to show that the jury was instructed that the

court should instruct under the former practice, still as a matter

of fact that was done. The record discloses that in the conclusion

of the evidence counsel for the defendant asked the jury to

attention to the fact that the court is instructed to the jury to

January 1, 1931 and the same was accordingly stated to the jury,

"given" or "received" and read the same instruction to the jury,

in accordance with the former practice. The record further discloses

that to the giving of each instruction followed by a question, objection

was taken by appellant, and so on of the opinion that he also test

appellant is not now in a position to question the competence of

the court's ruling upon the instructions would be manifestly unfair.

It is finally stated that the verdict was excessive,

but inasmuch as this case must again be tried, there is no necessity

for us to discuss this contention.

But the errors indicated, the judgment of the circuit

Court is reversed and this case remanded.

Reversed and remanded.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. ELAINE HUFFMAN, Justice. 278 I.A. 633³

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 17 1935 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A. D. 1934

Marcus O. Kagy,

Appellee,

vs.

Appeal from the Circuit Court
of Lake County

Robert Luke, et al,
(Samuel A. Sevin and Harriett
L. Sevin,
Appellants)

DOVE - J.

Marcus O. Kagy, since deceased, filed a bill in the Circuit Court of Lake County to foreclose a first mortgage trust deed and notes owned by him in the principal sum of \$8500.00, dated May 10, 1928 and executed by Robert Luke and Miriam Luke, his wife. The real estate is located in Waukegan. Luke was a building contractor. He had dealt with the cross-complainant, The North Shore Lumber and Supply Company, cross-appellant herein. In the transactions shown, Luke obtained loans as mortgagor and the cross-appellant supplied him his materials. The loans on the buildings were negotiated by appellant Samuel A. Sevin and Harold Shlensky. The latter paid the money obtained on the loan to Sevin for the cross-appellant and Luke obtained his money from them. Sevin was an officer and director of the cross-appellant and was active in its management. Luke bought the lot in question in March, 1928 and made application for a \$8500.00 first mortgage loan and a \$3,000.00 second mortgage loan on the property through Sevin for the purpose of Building a two-family apartment. This application was made to the firm of M. Shlensky and Sons. On May 10, 1928 the trust deed and notes for \$8500.00 were executed and delivered and they were later sold by Shlensky and Sons to the Fidelity Trust and Savings Bank, from which Marcus O. Kagy purchased them. Interest was paid on the mortgage indebtedness of \$8500.00 until

In the Circuit Court of Illinois

County of Cook

October Term, A. D. 1934

Monroe D. Lacey,

Appellant,

vs.

Robert Lacey, et al,
(Samuel A. Lacey and Harriet
L. Lacey,
Appellants)

DOVE - 1.

Monroe D. Lacey, since deceased, died in his
directly owned of and devised to his estate a first mortgage trust
deed and notes owned by him in the principal sum of \$2500.00, dated
May 10, 1928 and executed by Robert Lacey and Harriet Lacey, his wife.
The real estate is located in Chicago. Lacey was a building con-
tractor. He had dealt with the cross-appellant, the latter being
number and supply company, cross-appellant heretofore. In the trans-
actions shown, Lacey obtained from the latter a mortgage and the cross-
appellant supplied him his materials. The loans on the buildings
were negotiated by Robert Lacey at Samuel A. Lacey and Harriet Lacey.
The latter paid the money obtained on the loan to even for the
cross-appellant and Lacey obtained his money from them. Lacey was
an officer and director of the cross-appellant and was active in
its management. Lacey bought the lot in question in March, 1928
and made a application for a \$2500.00 first mortgage loan and a
\$2,500.00 second mortgage loan on the property through even for
the purpose of building a two-family apartment. This application
was made to the firm of M. Whelan and Sons. On May 10, 1928
the trust deed and notes for \$2500.00 were executed and delivered
and they were later sold by Whelan and Sons to the Lacey
Trust and Savings Bank, from which Monroe D. Lacey purchased them.
Interest was paid on the mortgage indebtedness of \$2500.00 until

May 10, 1930. The application for the second mortgage loan for \$3,000.00 was not granted. Shlensky and Sons paid \$5,000.00 to Sevin out of the proceeds of the sale of the loan, by checks later endorsed by both Sevin and the cross-appellant. Luke began building operations, but about November 1928 ceased work. He and his wife removed to Wisconsin and on November 17, 1929 executed a deed to the premises. The record shows that deed was made to Samuel A. and Harriett L. Sevin, his wife. The bill was filed because of alleged defaults in payment of interest and of the 1928 and 1929 taxes on the mortgaged premises. The North Shore Lumber and Supply Company filed its intervening petition, by which it set up a claim to a mechanic's lien on the mortgaged premises in the amount of \$10,000.00. After this, appellee amended his bill of complaint and alleged that Sevin and wife received this conveyance for the benefit of, and held the title as trustees for the lumber and supply company. The amendment also set out the filing of a claim for lien by the cross-appellant on May 27, 1931. Sevin and his wife thereupon amended their answer to the bill and denied that they were trustees for the cross-appellant. The findings of the Master were in favor of the appellee. Objections were overruled by him and stood as exceptions to his report and upon a hearing, the chancellor overruled these exceptions, approved the findings of the Master and entered a decree in favor of appellee.

The foregoing statement of facts is taken from the opinion of the Supreme Court, Kagy vs. Luke, 357 Ill. 512, to which court this appeal was originally taken, but the cause was transferred to this court, the Supreme Court holding that the litigation embraced only the enforcement of liens on real estate and did not directly involve a freehold.

The evidence disclosed that in March, 1928 Luke became the owner of the premises involved in this proceeding and at that time they were unimproved. On April 18, 1928 he executed a written

May 10, 1930. The committee on the second report of the
\$5,000.00 was not reached. The committee on the first report of the
Kevin one of the present of the life of the family, by showing a letter
endorsed by both parties and the cross-appellant. In the second bill-
the operations, but about the year 1928 or 1929. He and his
wife removed to Wisconsin and on November 17, 1928 executed a deed
to the premises. The record shows that deed was made to Edward J.
and Harriet L. Kevin, his wife. The bill was filed against the
alleged tenants in regard to interest out of 1928 and 1929
taxes on the premises and interest. The court thereupon ordered a bill
Company filed a motion for judgment, but it was not reached.
to a mortgagee's life on the mortgaged premises in the amount of
\$10,000.00. After that, Kevin executed a bill of sale to the Kevin
alleged that Kevin and wife received this conveyance for the benefit
of, and held the title as trustees for the husband and jointly as tenants.
The husband also executed the bill of sale to Kevin and his wife.
cross-as plaintiff on May 27, 1931. Kevin and his wife thereupon
arranged their answer to the bill and stated that they were the last
for the cross-appellant. The finding of the master was in favor
of the appellees. Objections were overruled by him and stood as
exceptions to his report and upon a hearing, the chancellor over-
ruled those exceptions, approved the findings of the master and
entered a decree in favor of the appellees.
The foregoing statement of facts is taken from the opinion
of the Supreme Court, 237 Ill. 511, 95 Ill. 511, to which court
this appeal was originally taken, but the same was transferred to
this court, the Supreme Court holding that the jurisdiction rested
only the enforcement of title on real estate and did not directly
involve a trustee.
The evidence disclosed that in 1928, 1929 and 1930
the owner of the premises involved in this proceeding and at that
time they were undivided. On April 12, 1928 he executed a bill

application for a loan addressed to M. Shlensky and Sons, Chicago, who were mortgage bankers or brokers. Harold Shlensky was general manager of the firm and he and Samuel Sevin were present when the application was made by Luke. Sevin and Shlensky had an arrangement whereby the commissions for procuring or negotiating the loan were to be divided between them. By this application, Shlensky was authorized to negotiate a first mortgage loan of \$8500.00 for five years, Luke agreeing to pay 6% on the amount procured as a commission for negotiating the same, together with all other incidental expenses in connection therewith. Pursuant to this application, Luke and his wife, on May 10, 1928, executed thirteen principal notes, two for \$250.00 each, six for \$500.00 each and five for \$1,000.00 each. These notes were payable to the order of the bearer and to secure the payment thereof they executed a deed of trust to the Chicago Title and Trust Company as trustee, covering the premises involved herein. These notes and trust deed were sold by Shlensky to the Fidelity Trust and Savings Bank within thirty days after May 10, 1928, the bank paying therefor \$8500.00 and the accrued interest thereon to Shlensky. Later Kagy bought them for their face value and accrued interest from the bank. After the trust deed and notes were sold to the Fidelity Trust and Savings Bank, Shlensky, at the request of Luke, paid to Samuel Sevin, on October 6, 1932, \$5,000.00. Sevin was at that time a director and president of cross-appellant, the North Shore Lumber and Supply Company, and it received the proceeds of these checks and credited the same upon Luke's account with them for materials which went into the construction of the dwelling.

The evidence further discloses that Robert Luke entered into an oral contract with North Shore Lumber and Supply Company by the terms of which the Lumber and Supply Company were to furnish materials for the erection of the dwelling upon the premises

involved in this proceeding, and in April, 1928, Luke commenced the construction thereof and continued until November, 1928, at which time the building was not completed, winter had set in, the second mortgage had been cancelled and there was not sufficient money available to go ahead and complete it. At that time Luke owed the Supply Company approximately \$4500.00, and Luke never did any further work on the building, but went to Genoa City, Wisconsin, where he remained until November, 1929. In November, 1929 Luke and his wife executed a blank deed to the premises in question and mailed the deed to North Shore Lumber and Supply Company. This deed was afterwards dated November 17, 1929 and filled out by inserting the description of the premises involved herein and the name of Samuel A. Sevin and wife as grantees, and it was the understanding of Luke that North Shore Lumber and Supply Company was to take title and it was executed with the understanding that it was to be accepted by cross-appellant in satisfaction of the amount due it. On September 3, 1930 Samuel A. Sevin entered into a written agreement with the Lumber and Supply Company, in which Sevin was designated as the owner and North Shore Lumber and Supply Company, designated as a contractor, by the terms of which the contractor agreed to supply all labor and material for the completion of the dwelling and in return the owner assumed the \$4500.00 indebtedness due from Luke and agreed to pay the contractor for completing the dwelling the sum of \$5500.00, making a total of \$10,000.00, and it is a lien for this amount which cross-appellant is endeavoring to assert in this proceeding. The North Shore Lumber and Supply Company undertook the completion of the building and did furnish the material and labor therefor, and on May 27, 1931 filed its claim for a lien for \$10,000.00.

The evidence further disclosed that of the proceeds of the \$8500.00 loan, Shlensky paid cross-appellant \$5,000.00 for Luke and that the balance is still held by Shlensky, who testified that he is willing to pay the same in the event the cross-appellant's

involved in this proceeding, and in April, 1938, Lake completed the construction thereof and completed until November, 1938, at which time the building was not completed, winter had set in, the second mortgage had been cancelled and there was not sufficient money available to erect and complete it. At that time the building was not completed, and the supply company approximately \$2500.00, and Lake never did any further work on the building, but went to Reno, Nev., where he remained until November, 1938. In November, 1938, Lake and his wife executed a deed to the premises in question and mailed the deed to North Shore Lumber and Supply Company, Ltd. The deed was dated November 14, 1938 and filed on November 15, 1938. The deed was executed by the members involved herein and the name of Samuel A. Levin was also a grantor, and it was the understanding of Lake that North Shore Lumber and Supply Company was to take title and it was executed with the understanding that it was to be accepted by cross-applicant in satisfaction of the amount due it. On September 2, 1938, Samuel A. Levin executed into a written agreement with the owner and North Shore Lumber and Supply Company, designated as the owner and North Shore Lumber and Supply Company, designated as a contractor, by the terms of which the contractor agreed to supply all labor and material for the completion of the dwelling and in return the owner assumed the \$2500.00 indebtedness due from Lake and agreed to pay the contractor by certified check the sum of \$2500.00, making a total of \$5000.00, and it is a lien for this amount which cross-applicant is indebted to as set in this proceeding. The North Shore Lumber and Supply Company undertook the completion of the building and did furnish the material and labor therefor, and on May 27, 1939 filed its claim for a lien for \$5000.00.

The evidence further disclosed that at the proceeds of the \$2500.00 loan, Chienky said cross-applicant \$5000.00 for Lake and that the balance is still held by Chienky, who testified that he is willing to pay the same in the event the cross-applicant's

claim for a lien is dismissed.

From this evidence, ~~that~~ the Master found that there had been a default in the payment of interest and taxes, that complainant had elected to declare the entire amount due and found that on December 12, 1932, there was due the complainant Kagy \$6,076.54, being \$5,000.00 principal, \$55.39 paid by the complainant to re-deed the premises from taxes on September 11, 1931, \$76.97 taxes paid by the complainant on July 2, 1931, interest on tax payments \$12.50, \$30.50 for continuation of abstract of title, \$3.00 for photostatic copies, \$10.50 for stenographic fees, \$600.00 solicitor's fees, the balance of \$287.68 being interest on the principal sum to that date. The Master further found that the sum of \$4500.00 due cross-appellant when Luke abandoned the construction of the dwelling was satisfied by the deed from Robert Luke and wife to Samuel A. Sevin and wife; that Samuel A. Sevin and wife held title to said premises for the use and benefit of the Lumber and Supply Company and that the Lumber and Supply Company were the equitable owners thereof and that legal title was held by Samuel A. Sevin and wife as trustees for the Lumber and Supply Company and that inasmuch as the Lumber and Supply Company are the equitable owners of the premises, it was not entitled to any lien for labor and material furnished on its own property and that the agreement of September 3, 1930 between Sevin and cross-appellant was unenforceable as the cross-complainant was that that time the equitable owner of the premises.

A decree was entered in accordance with the recommendations of the Master and from this decree, Samuel A. Sevin and Harriett L. Sevin have appealed and North Shore Lumber and Shpply Company have filed a cross appeal. It is insisted by Samuel A. Sevin and Harriett L. Sevin that they are the equitable, as well as the legal owners of the premises; that there was no default in the provisions of the mortgage and therefore the suit was prematurely brought and that the trust deed was usurious. On behalf of the North Shore

claim for a lien is dismissed.

From this evidence, with the Master found that there had been a default in the payment of interest and taxes, that complainant had elected to foreclose the mortgage account due and found that on December 12, 1932, there was due the complainant \$8,073.24, being \$5,000.00 principal, \$23.39 paid by the complainant to redeem the premises from taxes on September 11, 1931, \$78.97 taxes paid by the complainant on July 2, 1931, interest on tax payments \$2.00 for continuation of abstract of title, \$2.00 for photostatic copies, \$10.50 for stenographic fees, \$300.00 for the fee, the balance of \$237.68 being interest on the original sum to that date. The Master further found that the sum of \$500.00 due cross-appellant when loan advanced the construction of the dwelling was satisfied by the deed from Foster and wife to Samuel A. Levin and wife; that Samuel A. Levin and wife held title to said premises for the use and benefit of the lumber and supply company and that the lumber and supply company were the equitable owners thereof and that legal title was held by Samuel A. Levin and wife as trustees for the lumber and supply company and that inasmuch as the lumber and supply company are the equitable owners of the premises, it was not entitled to any lien for labor and material furnished on its own property and that the agreement of September 3, 1930 between Levin and cross-appellant was unenforceable and the cross-appellant was that that time the equitable owner of the premises.

A decree was entered in accordance with the recommendations of the Master and from this decree, Samuel A. Levin and Harriett L. Levin have appealed and both have asked that the lumber and supply company have filed a cross appeal. It is insisted by Samuel A. Levin and Harriett L. Levin that they are the equitable, as well as the legal owners of the premises; that there was no default in the provisions of the mortgage and therefore the suit was prematurely brought and that the trust deed was null and void. On behalf of the North Shore

Lumber and Supply Company, it is insisted that the court erred in dismissing its cross-petition for a lien, as its lien is superior to that of the original complainant, and that it is neither the legal or equitable owner of the premises, but that the premises are the property of Samuel A. Levin and Harriett L. Sevin.

The original bill was filed March 31, 1931. It alleged that the interest had been paid up to and including May 10, 1930 but that the interest due November 10, 1930 has not been paid, that the premises were sold for the general taxes of 1928 and were forfeited to the state for non-payment of the 1929 general taxes. By the provisions of the trust deed, the grantors agreed to pay the interest when due and all taxes as the same became due and not to permit the premises to be sold for non-payment of taxes and in default, gave the holder the right to elect to declare the principal sum due and recover the same by foreclosure. Without objection, John N. Thornburn testified: "Default was made in the payment of the interest note due November 10, 1930, that the plaintiff elected to declare the principal indebtedness immediately due and payable, that default was also made under the terms of the trust deed, in the failure of the owner to pay the general taxes for the year 1928, and because of default in payment thereof, the property described in the complaint was sold for non-payment of the general taxes; further default was made in the payment of the general taxes for the year 1929, and that the property as aforesaid has been forfeited to the State of Illinois because of the non-payment of said taxes". The evidence therefore sustained the allegations of the bill. Furthermore, the answer of the Sevin's did not deny the allegations of the bill with reference to the defaults therein alleged and there is no merit in the contention of appellants that the suit was prematurely brought.

Counsel for appellants state that the record discloses that appellee received 7% interest for two years on the principal sum of \$8500.00, which would amount to \$1190.00 and as the decree

the property of neutral ...

It is respectfully suggested that the bill be favorably reported.

that appears received V. that at on two years on the financial sum of \$100.00 which will make to \$100.00 and as the

found he was only entitled to interest on the principal sum of \$5,000.00, he received an equivalent of 11% interest per annum and that therefore the loan was usurious. We have searched the record and fail to find that there is any evidence that anyone ever paid interest aggregating \$1190.00. The only evidence upon this question was offered by appellee to the effect that interest coupons one to five inclusive were paid. The uncontradicted evidence is that Luke employed Sevin and Shlensky to negotiate this loan, which he, Luke, executed, that the Fidelity Trust and Savings Bank bought it from Shlensky and that appellee paid the bank therefor the face value and accrued interest thereon, and that Shlensky and Sevin had an arrangement whereby they were to divide the commissions. Shlensky and Sevin were Luke's appointed agents to negotiate this loan. They did so and with a part of the proceeds thereof Shlensky paid cross-appellant \$5,000.00 and the balance is still in Shlensky's hands. Sevin is the only one here complaining of ~~usury~~ usury and he was not an obligor upon the notes and while he now appears to be the owner of the legal title, the evidence is uncontradicted that the conveyance was made by Luke for the benefit of cross-~~appellant~~ appellant and for the sole purpose of discharging his indebtedness to it. Furthermore, Luke defaulted. He is not here complaining of usury and usury is a personal defense. Hibernian Banking Assn. v. Davis, 295 Ill. 537. In Hirsch v. Arnold, 318 Ill. 28, cited and relied upon by appellant, the defense of usury was raised and pleaded by the maker of the mortgage sought to be foreclosed and there is nothing said in that case or in First National Bank v. Drew, 226 Ill. 622, also cited by appellant, in conflict with what is said in Hibernian Banking Assn. v. Davis, supra. Counsel for Sevin further insist that a charge of 6% commission in addition to the 7% interest rate makes the transaction usurious, insisting that the evidence discloses that Shlensky used his own money in the transaction. The evidence is that Shlensky has not deducted as yet any commission and that before any sum was paid out the loan

found he was only entitled to interest on the principal sum of \$5,000.00, he received an equivalent of 11 interest per annum and that therefore the loan was usurious. He has testified the principal and fail to find that there is any evidence that anyone ever paid interest amounting to \$1190.00. The only evidence upon this question was offered by appellee to the effect that different persons who to five inclusive were paid. The uncontradicted evidence is that that appellee even had authority to negotiate this loan, which he, Lake, executed, that the Liberty Trust and Savings Bank bought it from him and that appellee paid the bank whatever the face value and secured interest thereon, and that appellee and even had an arrangement whereby they were to divide the commission. Glinovsky and Levin were Glinovsky's appointed agents to negotiate this loan. They did so as part of the proceeds thereof Glinovsky paid cross-appellant \$2,000.00 and the balance is still in Glinovsky's hands. Levin is the only one who has possession of money and he was not an obligor upon the notes and while he was unable to be the owner of the legal title, the evidence is uncontradicted that the conveyance was made by Lake for the benefit of cross-appellant and for the sole purpose of discharging his indebtedness to it. Furthermore, Lake testified that he is not now possessing of money and never in a personal debt. American Bank Note Co. v. Levin, 225 Ill. 337. In Hirsch v. Levin, 218 Ill. 33, cited and relied upon by appellant, the estate of Hirsch was raised and pleaded by the maker of the mortgage sought to be foreclosed and there is nothing said in that case or in First National Bank v. Brew, 228 Ill. 622, also cited by appellant, in conflict with what is said in Hirsch v. Levin, 218 Ill. 33, supra. Counsel for Levin further insist that a charge of 32 per centum in addition to the 11 interest rate makes the transaction usurious, insisting that the evidence discloses that Glinovsky used his own money in the transaction. The evidence is that Glinovsky did not deduct as yet any commission and that before any sum was paid out the loan

had been negotiated and the commission earned. Furthermore, Sevin occupies rather an anomalous position in this respect, as he is here insisting that the transaction was usurious, but if it was, the evidence is to the effect that he was to share in the usury. The Master and the chancellor found that the transaction was not tainted with usury and their findings are in accordance with the evidence.

It is next insisted by appellants and by cross-appellant that the evidence does not sustain the decree, which finds that Samuel A. and Harriett L. Sevin hold the title to these premises as trustee for cross-appellant. The evidence upon this question conclusively shows Robert Luke's intention to convey to cross-appellant to whom he was indebted for the purpose of extinguishing that indebtedness and when the names of Samuel A. and Harriett L. Sevin were inserted as grantees there was a departure from the authority expressed by Luke, whose testimony stands uncontradicted and is corroborated by the fact that no consideration ever passed from Sevin to Luke although Sevin insists that he personally assumed to pay Luke's indebtedness to cross-appellant. Sevin never did pay this indebtedness and no transfer thereof was ever made from Luke's account to Sevin on the books of cross-appellant and the conduct of cross-appellant in seeking a lien for \$10,000.00 is not ~~any~~ consistent with Sevin's position that he assumed payment of \$4500.00 of this amount. The finding of the Master and decree of the chancellor in this particular is abundantly supported by the evidence.

It is finally insisted by counsel for cross-appellant that it furnished material which entered into the completion of the dwelling and that it is therefore entitled to the enforcement of its lien. What we have already said disposes of this contention.

We find no reversible error in this record, and the decree of the lower court is therefore affirmed.

DECREE AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

14
63
504
A
PUBLISHED IN ABSTRACT

**M. N. Hollander & Co., an Illinois Corporation, Appel-
lant, v. Edward J. Hughes, Secretary of
State of Illinois, Appellee.**

Appeal from Circuit Court, Sangamon County

OCTOBER TERM, 1934

Gen. No. 8844

278 I.A. 633⁴
Agenda No. 10

MR. JUSTICE FULTON delivered the opinion of the Court.

The Appellant applied to the Secretary of State for registration as a dealer and broker. After an order was entered by Appellee denying the application the case was appealed to the Circuit Court of Sangamon County for a review of said order. Upon such appeal the Circuit Court affirmed the order of the Secretary of State, Appellee, and the record made in that Court is by appeal brought to this Court for review.

The petition was filed in the Sangamon County Circuit Court on September 5, 1933, in compliance with Section 23G of the Illinois Securities Act, which provides that the action of the Secretary of State in refusing to register any dealer and broker shall be subject to review in the Circuit Court of Sangamon County in the same manner and with the same rights as provided in Section 18 of the Act. Section 18 states that any person feeling aggrieved may file his petition within thirty days thereafter against the Secretary of State as defendant to review his action in refusing to register applicant as a dealer and broker under the Act.

Section 23E of the Illinois Securities Act provides that the registration of a dealer or broker may be refused after five days notice and opportunity for hearing given by the Secretary of State if the Secretary of State shall determine that such applicant or registrant so registered, or any officer, director, member or partner, manager or trustee thereof

“(F) Has made or is making misrepresentation of any essential or material fact to the Secretary of State, or has violated the provision of the laws of any foreign State regulating the sale of securities therein or has violated the provision of this Act or any order, rule or regulation of the Secretary of

State pertaining to the enforcement of this Act.,

“(H) Is not of good business repute.”

The order of the Secretary of State which was affirmed by the Circuit Court of Sangamon County found upon investigation that Appellant or its officers or directors had made misrepresentation of an essential or material fact to the Secretary of State as follows:

“(A) M. N. Hollander, President of M. N. Hollander & Company stated under oath to the Secretary of State on July 19, 1933, that he did not know Mrs. Helen E. Mallette, of Garden Grove, Iowa; had never sold securities to her and that there never was a complaint against him relative to such sales. Whereas, evidence brought in the investigation shows that M. N. Hollander sold securities to Mrs. Helen Mallette and that a complaint was filed against him in Iowa, relative to the transactions with Mrs. Helen Mallette.”

Further findings in the order state that M. N. Hollander, President of Appellant stated to the Secretary of State that he had never worked for Victor J. Silliman Company, Inc., whereas the evidence disclosed such employment and sales of securities by misrepresentation to one J. B. Synhorst of Des Moines, Iowa, on or about March 31, 1931.

Also that M. N. Hollander had made further contradictory statements under oath about his employment for Mathias and Fulks of Peoria, Illinois. Also that the said M. N. Hollander & Company or its officers or directors were not of good business repute because of their previous employment with firms or Corporations whose tactics in the sale of securities have tended to work fraud upon investors.

The chief contention of Appellant is that there is no foundation whatsoever in the record to substantiate such findings and that the same are not based on material facts.

A trial in the Circuit Court is not de novo but is to ascertain if the order or rule of the Secretary of State is wrongful or unreasonable. *Choate v. Commerce Commission* 309 Ill. 248. The order entered is within the discretion of the Secretary of State and the exercise of such discretion therefor is not subject to review, except for an abuse. *Fidelity Investment Assn. v. Emmerson* 235 App. 518. Section 18 of the Illinois Securities Act further provides that “Merely technical irregularities in the procedure of the Secretary of State shall be disregarded, and the burden of proof on

all questions in controversy shall rest upon the petitioner."

The testimony in the record consists of the examination of M. N. Hollander and Albert L. Ancel, owners of the stock and officers in Appellant Company, together with documentary evidence, all taken before one of Appellee's Commissioners. M. N. Hollander denied on the witness stand that he ever knew Mrs. Helen E. Mallette of Garden Grove, Iowa, or that he had ever sold her any securities or that any complaint had ever been made by Mrs. Mallette in connection with his sale of securities to her, while in the employ of the D. A. Dobry Securities Company. Letters written by this Company to Mrs. Mallette, indicating that Hollander had sold Mrs. Mallette a large amount of the preferred Dobry Stock and in answer to a complaint by her of a failure to receive dividends as well as a letter written by said Company to the attorney for Mrs. Mallette were all introduced in evidence and all referred to sales of Dobry Securities by Hollander to Mrs. Mallette. The contention of Appellant that these letters are not competent evidence because the witnesses were not personally present and no opportunity was offered for cross examination is without merit because the Commissioner conducting the hearing offered to delay the same and take depositions to clear up the inference of misrepresentation made in the letters but this offer was refused by counsel for Appellant.

The evidence introduced in support of the other findings in the order of Appellee touching the contradictory statements made by said officers and denials by them of employment with firms whose tactics in the sale of securities had tended to work fraud on investors standing by itself would not be sufficient in our judgment to warrant a refusal by Appellee to issue the license applied for but the Mallette incident was serious enough to warrant further inquiry and the testimony of M. N. Hollander denying any knowledge of such transaction coupled with the refusal to take depositions amounted to a misrepresentation of an essential or material fact. Statements made by the Commissioner of Appellee on the hearings as to the possibility of a license being issued subject to cancellation later on if evidence of fraud and misrepresentation is developed on the part of Appellant's officers were not binding upon Appellee. We do not agree with Appellant that the burden of proof was upon Appellee to show fraud and misrepresentation on the part of Appellant in the

same manner and by the same rules of evidence that govern the proof in a case at law before a Court. The Court in a case of this character should not usurp legislative or administrative functions by setting aside a legislative or administrative order on its own conception of the wisdom of it. *W. C. & W. R. R. Co. v. Commerce Commission* 309 Ill. 412. In the same case the Court said "Orders of the Commission are entitled to great weight, and can be set aside only if arbitrary or unreasonable or in clear violation of a rule of law." The record does not disclose to us that the action of Appellee was unreasonable or wrongful.

The judgment of the Circuit Court of Sangamon County and the order of Appellee are therefore affirmed.

Judgment Affirmed.

(Five pages in original opinion)

Abstract
Published in Abstract

Mollie A. Knochel, Administratrix of the Estate of
William M. Knochel, deceased, Appellee, v. The
City of Lincoln, a Municipal Corporation,
and Central Illinois Electric and
Gas Company, a Corporation,
Appellants.

278 I.A. 634

Appeal from Circuit Court of Logan County.

OCTOBER TERM, A. D. 1934.

Gen. No. 8852

Agenda No. 16

MR. JUSTICE FULTON delivered the opinion of the Court.

This was an action brought by Mollie A. Knochel, as Administratrix of the Estate of William M. Knochel, deceased, for damages, under the Statute, for the next of kin. Appellants were joined as defendants. The next of kin of the decedent were Mollie A. Knochel, his widow, Paul Knochel, a son, and Marguerite Knochel a daughter. The declaration consisted of one count charging general negligence, to which a plea of general issue was filed. There were two trials of the case in the Circuit Court, the first one resulting in a disagreement and in the last one there was a verdict and judgment in favor of Appellee for \$4250.00, from which judgment Appellants appeal.

The accident happened on Broadway Street in the City of Lincoln. The street was 80 feet wide and extended in a northwesterly and southeasterly direction. It is intersected at right angles by Ottawa Street and one block east of Ottawa Street by Kankakee Street. Lincoln High School is located on the north-east side of Broadway. Directly across the street was a block used as a play ground for Community sports. Tennis courts, cinder track, baseball diamonds with bleachers for spectators and flood lights for evening games were part of the equipment located on the play ground. The street was paved with brick for forty feet between curbs. On the southwest side of the street adjacent to the play ground was a concrete sidewalk and adjacent to that a lawn or parkway fourteen feet in width which extended from the sidewalk to the curb.

The curb was a stone curb $7\frac{1}{2}$ inches high above the brick pavement. For several years prior to the accident there was in the lawn or parkway at a point about opposite the High School building and about three or four inches from the inside of the curb, a three-quarter inch gas pipe extending three inches above the surface of the lawn and with a screwed cap upon it about one inch in depth, which made the gas pipe four inches in height above the surface of the ground. This pipe was what is commonly known as a drip riser or drip pipe and was connected with the main gas line, which ran along and under the paved portion of Broadway Street. The dead grass from the previous year surrounded the gas pipe and was from two and one-half to three inches in height. The gymnasium of the High School was used frequently for public meetings and for the indoor athletic contests of the High School teams. People attending these meetings would quite generally park their cars on Broadway and adjoining streets and walk across the lawn in all directions in order to reach the High School Building.

On Saturday afternoon, April 8, 1933, a High School Election was being held at the High School Building, the polls of which election were open until seven o'clock in the evening. The decedent, William Knochel was a man of 64 years of age and a blacksmith by occupation. He was in good health and about six thirty that evening drove from his home with his wife and daughter to the polls to vote. The daughter drove the car and decedent with his wife occupied the rear seat, the wife riding on the right hand side. They approached the High School on Ottawa Street along the northwest side of the play ground. At the intersection of Broadway and Ottawa Streets they turned right on Broadway and parked the car on the right hand side of Broadway close to the curb and almost directly across the street from the west front door of the High School building. The daughter left the car from the left front door and proceeded directly across the street toward the High School building. The wife got out of the right hand door of the car and proceeded northwest parallel with the street to the rear of the car and started to cross Broadway and reached a point just past the line of cars when she looked back and discovered her husband lying on the ground with his head and arms upon the pavement. Paul Knochel, the son had eaten supper at his fathers home and in his own car with his wife and two children had followed his sisters car to the High School. His car was parked

about fifteen feet behind his sisters car on the same side of the street. His wife alighted from the car and started over to vote while Paul Knochel remained in the drivers seat in his car with his two children. He saw his father and mother get out of their car and watched them walk to the rear of the sisters car on the lawn. He testified that when his father reached the rear of his sisters car on the lawn he turned to walk into the street and either tripped or fell over something and fell out on the pavement. He further testified that his father remained a minute or two on the pavement and that he helped his father up and into the car; that while his father was lying on the pavement he said he had fallen over that damn pipe; that he went back that same evening and kicked in the grass and felt this pipe. William Knochel sustained a fracture of the femur bone on his right leg. He was taken home that evening and the following day was taken to the hospital where he remained until his death.

The Appellants urge as one of the principal causes for reversal that there is no competent evidence in the record to show that the decedent tripped over the gas pipe. The testimony of Paul Knochel, aside from the statement he heard his father make while lying on the pavement would not be sufficiently definite to establish that fact. Therefore the question arises as to the remark made by the father that "he fell over that damn pipe." The Court evidently considered it a part of the *res gestae* and it was admitted. "A declaration made of an act done after the happening of the principal fact may be admissible as part of the *res gestae* when it is so intimately interwoven with the principal fact by the surrounding circumstances as to raise a reasonable presumption that it was made or done under the immediate influence of the principal transaction or event itself, and is the spontaneous utterance or expression of thoughts created by, and springing out of the transaction itself rather than the result of any premeditation or design" 22 Corpus Juris 455. In very similar cases our Supreme Court has said that such statements as the one made by the decedent are plainly admissible as part of the *res gestae*. *Am. Liability Ins. Co. v. Industrial Com.*, 342 Ill. 605. *Muren Coal & Ice Co. v. Howell*, 217 Ill. 190. It is our judgment that the remark made by William Knochel was so closely connected with the injury as to make it a part of the *res gestae* and that its admission in evidence was not error.

Another contention of Appellants is that the death of William Knochel did not follow as a proximate result of the injury and no causal relation between the two was proven by a preponderance of the evidence. The two attending physicians testified that the death was due to a perforation of the pylorus of the stomach caused by an embolism. A great deal of medical testimony was introduced by Appellants and no less than seven specialists and experts testified that from their knowledge and experience it would be a physical impossibility for an embolus to arise from oily or fatty material entering the circulation at or in the vicinity of the fracture of the leg similar to that contended for by Appellee in this case, and to pass through the lungs and circulatory system and to form any embolism at or in the vicinity of the stomach which would cause perforation and result in death. The reasons for their opinion are shown in great detail in the testimony and counsel for Appellants insist that the weight of this testimony is so great as to refute the theory advanced by Appellee. The attending physicians, one of whom was a brother of the decedent, testified that they had made a diagnosis a couple of days before the death of decedent and that he had an embolism at or in the vicinity of the stomach. In spite of the high character of Appellants testimony on this point there is a definite conflict between the medical testimony of Appellee and Appellant so that it became a question of fact for the jury to determine and this Court cannot say that the finding of the jury was without any testimony to support it or that their verdict was manifestly against the weight of the evidence.

Complaint is made of several of Appellee's given instructions and while they are not free from criticism, they do not appear to constitute reversible error. Instruction No. 1 consists of a long detailed statement of the issues set forth in the declaration and in our opinion was more confusing than helpful to the jury. However, with the cautionary language at the conclusion telling the jury that the instruction was for the purpose of informing them of the charges made in the declaration and for no other purpose, it could not be deemed substantial error. Instruction No. 10, in effect, told the jury that the franchise ordinance granted by the City of Lincoln, did not excuse the Gas Company from due care and diligence in the construction of its pipes and equipment to render the streets or parts thereof occupied by its gas pipes or equipment reasonably safe for use by persons passing over same

and "Notwithstanding such franchise it remained the duty of the grantee thereof to use due care and diligence to provide such safe guards and means of safe guarding such gas pipe as would render the same reasonably safe." Standing alone it seems to us that this instruction might prove prejudicial to Appellants but the Court on its own motion gave the following instruction to the jury. "The Court instructs you that the defendant, Central Illinois Electric and Gas Co. had a legal right to construct and maintain on the lawn or boulevard in question such structures and appurtenances as were necessary or proper in the conduct of its business as a utility serving the people of Lincoln with gas service, provided it used reasonable care in the construction and maintenance of such gas pipe," and the two instructions being read together could hardly mislead the jury as to what the true rule of law was governing corporations who use the public streets of a municipality for its gas pipe lines.

Other rulings of the Court on the admission and exclusion of evidence and remarks of Appellee's counsel in his closing argument are objected to but we do not consider them serious error.

The judgment of the Circuit Court will therefore be affirmed.

Affirmed.

(Six pages in original opinion)

Abstract
Union filed - January 4, 1934

PUBLISHED IN ABSTRACT

65 H

James M. Parsell, Plaintiff in Error, v. Frank S.

Parsell, et al., Defendants in Error.

Error to Circuit Court of Jersey County.

OCTOBER TERM, A. D. 1934.

278 I.A. 634²

Gen. No. 8855

Agenda No. 19

MR. JUSTICE FULTON delivered the opinion of the Court.

Plaintiff in Error filed his bill in equity in the Circuit Court of Jersey County praying that he be permitted to redeem his interest in a farm located in that County which had been sold by the Sheriff under an execution issued upon a judgment. The facts set forth in the bill show that Plaintiff in Error was the owner of an undivided one-fourth interest in a 240 acre farm, he and his brother and two sisters having derived title thereto from their mother, Delia C. Parsell, who retained a life interest in said farm for herself. The bill further shows that Plaintiff in Error was in possession of the farm and living thereon with his family. In February 1929, the Jersey State Bank obtained a judgment against Plaintiff in Error, his former wife, Emily E. Parsell and his mother Delia C. Parsell, for \$1,345.30. Execution was issued upon the judgment and placed in the hands of the Sheriff for levy and sale. Thereupon the Sheriff levied upon all the right, title and interest of the three judgment debtors in and to said farm and sold the same at public auction on June 4, 1932 to Defendant in Error, Frank S. Parsell, the highest bidder at the sale for the sum of \$2,650.00. The bill also alleges that the Sheriff failed to offer the land in parcels at the sale but sold the same *en masse* for a price that was wholly and grossly inadequate and for less than the value of the interests of himself and his mother. It also avers that Plaintiff in Error was occupying a portion of the premises as a homestead and that his homestead was not set off to him by the Sheriff. The bill further states that Plaintiff in Error had estimated the amount of money for which his interest in the farm had been sold at the sum of \$1,200.00 and had tendered and offered that amount plus interest at six per cent from the date of sale to the Defendant in Error for the purpose of redeeming his undivided one-fourth interest in the farm, but that the

said Defendant refused to accept any amount less than the sale price of \$2,650.00 and interest. The prayer of the Bill asked that he not only be allowed to redeem from the sale his undivided one-fourth interest in the farm, without making redemption from the sale of the life interest of Delia C. Parsell therein but also requested that the Court fix and determine from evidence to be produced, the amount for which the interest of Plaintiff in Error in said real estate had been sold by the Sheriff at the sale and direct by its decree that upon payment of that amount together with interest at six per cent from the date of sale the Sheriff be required to execute and deliver to the Plaintiff in Error a certificate of redemption of his interest in the premises.

Defendant in Error, Frank S. Parsell, filed a general demurrer to the amended bill which upon argument was sustained by the Court and Plaintiff in Error electing to stand by his amended bill, the same was dismissed for want of equity and a writ of error was sued out in this Court for the purpose of reviewing the action of the Circuit Court in sustaining such demurrer.

The right of the Plaintiff in Error to redeem from sale on execution is purely statutory and must be exercised in the manner required by the statute, or it will be invalid. *Durley v. Davis*, 69 Ill. 133. Plaintiff in Error relies upon Par. 26, Chap. 77, Cahills Revised Statutes, which provides for the redemption by the joint owner of his interest in the premises sold, "in the manner and upon the conditions hereinbefore provided." Section 18 of said chapter provides that any defendant may redeem within twelve months from date of sale by paying to the purchaser or the officer making the sale, the sum of money for which the premises were sold with interest thereon. Section 25 of said chapter provides "any person entitled to redeem may redeem the whole or any part of the premises sold, in like distinct parcels or quantities in which the same were sold." Plaintiff in Error did not attempt to comply with such statutory requirements. In the case of *Carabelli v. Carabelli*, 266 App. 453 the Court said, "The Statutes nowhere provide that a judgment creditor may redeem by paying any less sum than the full amount for which the land is sold and we have been unable to discover any good reason why we should hold that Section 26 is controlling in the instant case and not Section 25. The various sections of Chapter 77 must be construed as to give effect to the legislative will, bearing in mind that redemptions are looked upon with favor, and where no injury is to follow, a liberal

construction will be given to redemption laws and it has been held that where two or more lots or tracts of land have been sold *en masse*, the redemption can only be *en masse* and there can be no redemption of a part; when sold *en masse* they can be redeemed only in like manner; a Sheriff would have no right to divide up a bid and apportion it among several tracts of land where the same have been sold *en masse*." To the same effect is *Oldfield v. Eulert*, 148 Ill. 614.

It is our judgment that Plaintiff in Error was not entitled to the relief prayed for in his bill and that he could only make redemption by paying the full amount for which the Sheriff made such sale and then if he desired seek contribution from Delia C. Parsell for the proportion of the debt which she equitably should have paid.

The decree of the Circuit Court dismissing Plaintiff in Error's bill of complaint will be affirmed.

Affirmed.

(Four pages in original opinion)

Earl Weakly, Appellee, v. Ruth Firebaugh, Admx. with
Will annexed of the Estate of C. C. Firebaugh,
deceased, Appellant, and C. Walter Jones.

Appeal from the Circuit Court of Shelby County.

OCTOBER TERM, A. D. 1934.

278 I.A. 634³

Gen. No. 8860

Agenda No. 22

MR. JUSTICE FULTON delivered the opinion of the Court.

This was an action of replevin by the Appellee, Earl Weakly, against C. C. Firebaugh, since deceased, and C. Walter Jones, Appellant, as administratrix, was substituted upon the second trial. The Appellee sought to recover possession of certain personal property and on a trial before a jury was awarded such possession in the verdict. The administratrix, alone, prosecutes this appeal. The Appellee, prior to October 15, 1930, had been operating a farm in Shelby County, part of which he owned and part of which he had leased from another party. He ceased farming and moved into the City of Shelbyville on about the above date, leaving his live stock and farming implements upon the farm. In February, 1931, he leased the farm to the defendant Jones, who on March 1, 1931, moved on to the premises as a tenant, bringing with him a small amount of live stock and equipment which he owned. The original agreement provided that Jones was to operate the farm on a 50-50 basis, which was done for a few weeks. On about March 28, 1931, the parties reached a new agreement, whereby Jones offered to purchase the personal property owned by Weakly, then on the farm, and to operate the farm on his own responsibility as a tenant. The list of the personal property to be purchased by Jones amounted to \$1,630.20. On April 14, 1931, Jones and Appellee went to a lawyers office and had a written lease of the premises prepared and executed running from Appellee to Jones. At the same meeting the sale of the personal property was discussed and the lawyer suggested that Appellee take a note from Jones for the full amount of the purchase price that he also execute a Chattel Mortgage to secure said note. Both the note and Chattel Mortgage were signed by Jones but on account

of the lateness of the hour the Chattel Mortgage was not acknowledged before a Justice of the Peace. The lawyer called up a Justice of the Peace on the telephone and Jones talked to him and told him that he had executed the Chattel Mortgage and wanted to acknowledge his signature. Nothing further was done about the acknowledgment by Jones of the Chattel Mortgage, and the instrument was never recorded. There is some testimony in the record about the monthly milk checks being paid over to Appellee to apply upon the note, about Appellee permitting the personal property in controversy to be listed with the tax assessor in the name of Jones, and that Appellee stated he did not want to record the Chattel Mortgage because he would have to pay taxes on it. On May 27, 1931, one C. C. Firebaugh, since deceased, and then the president of the Commercial State Bank at Windsor, Illinois, procured a note and Chattel Mortgage from Jones covering the Chattel property in question, for an indebtedness due and owing the bank from Jones. This mortgage was duly acknowledged and recorded and on June 29, 1931, a subsequent note and Chattel Mortgage were executed and delivered to Firebaugh covering additional Chattel property. On September 7, 1931, Firebaugh closed both of his Chattel Mortgages and at the foreclosure sale bid in the property. Appellee brought this suit in replevin to recover the property from Firebaugh. On a previous trial of the case before a jury, a verdict was rendered for Appellee. That case was reversed and remanded for a new trial by this Court because the jury were instructed that if they believed from the evidence that the contract of sale between Appellee and Jones provided that the latter was to secure the purchase price of the property by executing a Chattel Mortgage on the property sold and that Jones failed to complete his contract and did not execute the mortgage as provided in the contract, then Jones would not have acquired title to said property under said contract of sale. In that trial the Court said there was evidence tending to show that Appellee by his conduct waived the condition that Jones was to secure the purchase price of said personal property by a Chattel Mortgage and therefore the question of waiver was not properly submitted to the jury by said instructions. In this trial of the case the question of waiver was fully presented to the jury and a verdict awarding possession of the property to Appellee was again returned by the jury.

Appellant complains of the rulings of the Court on the admission of testimony and because of prejudicial remarks made by Counsel for Appellee but there is nothing in these objections that could be deemed substantial error. Neither do we consider it necessary under the circumstances of this case for Appellee to have made a demand for possession of the property previous to instituting this action of replevin.

Where there is nothing in a case but questions of fact, and the evidence in regard to the controlling question is conflicting the jury are the better judges of the credibility and reasonableness of the testimony of the witnesses, and after the verdict of two juries the same way, the Appellate Court does not feel justified in reversing the case. *Ill. Cent. R. R. Co. v. Spordeder*, 100 App. 626, affirmed in 199 Ill. 184. The facts in this case have been twice fairly and fully presented to a jury and each time the result has been the same. Under these circumstances we do not believe there is sufficient error in this record to warrant a reversal of the case and the judgment of the lower Court will therefore be affirmed.

Affirmed.

(Three pages in original opinion)

67 H 402
PUBLISHED IN ABSTRACT

Colchester Building, Loan and Investment Association,
of Colchester, Illinois, a Corporation, Complainant,
v. Alonzo O. Kline and Lenore H. Kline, Mil-
dred Campbell, also known as Mildred
Freeman, Jesse R. Campbell, Ralph G.
Mackemer and Imon J. Patton,
Defendants.

Alonzo O. Kline and Lenore H. Kline, Cross-Complain-
ants, Appellants, v. Colchester Building, Loan
and Investment Association, of Colchester,
Illinois, a Corporation, Ralph G. Mackemer
and Imon J. Patton, Cross-Defendants,
Appellees.

278 I.A. 634⁴

Appeal from Circuit Court, McDonough County

OCTOBER TERM, 1934.

Gen. No. 8863

Agenda No. 25

MR. JUSTICE FULTON delivered the opinion of the Court.

This was a Bill to Foreclose a mortgage by the Colchester Building Loan and Investment Association of Colchester for the sum of \$3,000.00 against the Appellants Alonzo O. Kline and Lenore H. Kline, his wife, who were the makers of the note and mortgage. A Cross-bill was filed by Appellants and the Decree of the Court from which Appellants appeal dismissed the Cross bill for want of equity. The only Appellee filing a brief and argument on this appeal was Ralph G. Mackemer.

The facts disclose that the Appellants were dealing with the Mackemer and Patton Lumber Company. Appellant was the owner of a lot upon which a house was located. He desired to build a sandwich shop or lunch room and applied to the Lumber Company to purchase the material necessary for the construction. Imon J. Patton was the Manager of the lumber firm and he arranged with Appellant to furnish the material for the

new building and also arranged for the purchase of a lot upon which the house owned by Appellants was moved. This lot was purchased from one Dwight Reed and the title was taken in the name of Appellant Alonzo O. Kline. The material for the sandwich shop was furnished Appellant by the lumber company and the account for its payment was carried on the books in the name of "Kline House Account."

Appellant then applied to the Colchester Building Loan and Investment Association and secured a loan of \$3000.00 for which he and his wife executed a mortgage on the property to secure the loan. At the time the application was made the representation to the Loan Association was that the Appellants were the owners of the property and no mention was made about any one else being interested in the property. Appellants secured the full amount of the loan of \$3000.00 minus the expense at the Loan Association office and paid the entire proceeds therefrom to the Mackemer and Patton Lumber Company. The building was constructed and from the date of the loan in December, 1929, the payments were made through checks drawn by the Loan Association on Appellant Alonzo O. Kline and the draft issued in payment of the loan was made payable to the said Appellant and endorsed and cashed by him. In September, 1930, Kline requested the Loan Association to check on the account of Imon J. Patton and from that date to April, 1931, checks were drawn upon Imon J. Patton individually for the payment of the monthly interest and dues. There is no testimony in the record showing an express agreement on the part of the Lumber Company to pay the debt. The controversy largely arises over a deed to the premises which was executed by Appellants to Ralph G. Mackemer individually, which contained the following provisions, "There is excepted from the above warranty the mortgage indebtedness held by the Colchester Homestead Lumber and Investment Company." After the delivery of this deed, in April, 1931, the Grantee Ralph G. Mackemer paid the assessments to the Loan Association individually until November, 1931, when he sold the place to one George B. Kerman.

Later a bill to foreclose was filed by the Loan Association, a Decree of Sale entered, sale made by the Master at which there was a deficiency of \$1,375.17. Upon approval of the Master's Report of Sale a deficiency judgment was entered against the Appellants Alonzo O. Kline and Lenore H. Kline for said amount with interest from September 8, 1933.

It is the contention of the Appellants and alleged in their Cross bill that the real consideration for the deed to Mackemer was the assumption of the mortgage debt by Ralph G. Mackemer and Imon J. Patton and that they were entitled to judgment against the said Appellees for the amount of the deficiency judgment and interest thereon as provided by law. They further contend that the deed to Mackemer is not certain and that it must be explained by parol testimony and that the Court erred in refusing to admit parol testimony that Mr. Mackemer gave his Grantee the sum of \$300.00 for accepting his deed, but this transaction occurred long after the deal was finished and we think the Court properly excluded such testimony.

It is our judgment there is nothing in the deed to Appellee, Ralph G. Mackemer, whereby he assumed or agreed to pay any part of the mortgage indebtedness. Excepting the mortgage indebtedness from the warranty in the conveyance could not be construed as any such assumption. Neither could the payments by the lumber company or by Mackemer individually be construed as assuming the payment of the mortgage indebtedness. There is no testimony anywhere in the record whereby Mackemer or the lumber company agreed to pay any part of the mortgage debt. The application for the loan was made by the Appellant Kline, representing that he was the sole owner of the real estate and that it was his own indebtedness. Under these circumstances we believe the Cross Complainant failed to sustain the burden of proof on the allegations of their Cross bill, and that they are not entitled to any judgment against the Appellees Ralph G. Mackemer or Imon J. Patton.

We therefore feel that the Decree of the Circuit Court dismissing the Cross bill of Appellants was correct and that the same should be affirmed.

Affirmed.

(Four pages in original opinion)

302
BETTER
union filed 17-1-5-
68 H
PUBLISHED IN ABSTRACT

**Village of Exeter, Plaintiff in Error, v. Frank Rock-
wood and Charles Rolf, Defendants in Error.**

Error to Scott County Circuit Court.

OCTOBER TERM, A. D. 1934.

278 I.A. 634⁵

Gen. No. 8866

Agenda No. 28

MR. JUSTICE FULTON delivered the opinion of the Court.

This was a suit begun by the Village of Exeter against Defendant in Error to recover the price of a certain quantity of gravel hauled away from the Village amounting to the sum of \$2,000.00 during the years of 1932 and 1933. The declaration consisted of the common counts directed to the April Term, 1933, of the Circuit Court of Scott County. Summons was issued and served on Defendants in Error and at the April Term, 1933, of said Court Defendants in Error moved to quash the summons so issued and served on them on the ground that it was made returnable to the wrong term of the Circuit Court. On the hearing of said motion the Court quashed the summons and the service thereof but subsequently on motion of the Plaintiff in Error the action of the Court was set aside and a new summons was ordered by the Court to issue to the October Term, 1933, of said Court which was done. On the coming on of the October Term, 1933, of said Court the Defendants in Error again appeared and moved the Court to dismiss the suit on the grounds that the counsel for the Plaintiff in Error, Village of Exeter, a municipal corporation, had passed no resolution or written order of any kind employing counsel to bring the suit and hence the suit was brought by counsel without authority. Upon a hearing on said motion the Court sustained Defendants in Error motion to dismiss the suit and ordered that the same be dismissed and the Plaintiff in Error pay the costs.

The Plaintiff in Error contends that no resolution or written order was necessary to employ counsel to bring this suit or to defend any suit that might be brought against the Village and further that because Defendants in Error at the April Term of Court only contended that the summons served on them was not properly returned to the April Term of said Court,

they waived their right to question the authority of counsel to bring a suit and could not wait until the October Term, 1933, of said Court and then for the first time make objections that counsel had no authority to bring the suit.

The Defendants in Error supported their motion to dismiss by the affidavit of F. C. Funk one of the attorneys for defendants in Error in which he stated that he had interviewed the Village Clerk and has made a search of the records of the Village of Exeter and that no authority was ever given to C. C. Carter and S. H. Cummins or any other person by said Village for the institution of this proceeding. In the suit of the *City of Winchester v. Ring*, 312 Ill. 544 the Court said, "We have seen that the petition need not recite the authority of the City Council in such proceeding. If the city has the right to file a petition, direction to counsel representing the City will, in the absence of statutory requirements or proofs to the contrary, be presumed. We are cited to no contrary Statute or proof in this record. The authority of counsel to appear for a party and to institute suit will be presumed, in the absence of proof to the contrary."

In our judgment the affidavit of F. C. Funk was not sufficient proof to warrant the Court to dismiss the suit on the ground that counsel had no authority to bring the same. The question of the right of counsel to enter its appearance for Plaintiff in Error was a matter of right between it and the counsel who purported to represent it in this suit and in the absence of competent proof showing to the Court that counsel was without authority to institute the same the Court erred in dismissing the suit.

It is our judgment that because of such error the judgment of the lower Court should be reversed and the cause remanded for a new trial on the merits.

Reversed and remanded.

(Three pages in original opinion)

retract.

union filed Jan. 1, 1934

1110

697

PUBLISHED IN ABSTRACT

**Lacy L. Brown, and Lacy L. Brown, trustee Appellee,
v. Lena E. Smith and Fred A. Smith, Appellants.**

Appeal from the Circuit Court of Tazewell County.

OCTOBER TERM, A. D. 1934.

278 I.A. 635

Gen. No. 8851

Agenda No. 15

MR. JUSTICE ALLABEN delivered the opinion of the Court.

This is a suit in equity brought by appellants Smith, against appellee Brown, to cancel a note and trust deed given by appellants to appellee. Appellee, as executrix of the estate of William Murray, deceased, caused a judgment by confession to be entered in the Circuit Court of Tazewell County, against appellants, for the sum of \$1,453.75, upon a note given to William Murray. Execution was issued on said judgment and served on appellants.

The bill alleged that the consideration for the alleged trust deed was for the purchase of slot machines and gambling devices and that because of the fear that their property would be sold under the execution issued upon the above mentioned judgment, the appellants paid the appellee \$488.11 in cash on August 10, 1932, to be applied on said judgment and, at the same time, executed to appellee, their note for \$965.34, due in one year, and secured by their trust deed, which note and trust deed were given in satisfaction of the balance of the judgment; that the cash paid and that the consideration for the note and trust deed was for slot machines, roulette wheels and other gambling devices used in operating and conducting a gambling place; that the appellee knew that the note and trust deed were given in payment for such gambling machines and the appellants, therefore, asked that the note and trust deed be declared null and void, cancelled, and set aside, and also for general relief.

To this bill the appellee filed a general and a special demurrer. After the appellants' bill was filed, the appellee, individually, as owner of the note, and as trustee in the trust deed on, to-wit: September 1, 1932, filed her bill against the appellants to foreclose the trust deed. The appellants filed their answer to the bill to foreclose to which exceptions were filed and

sustained and leave granted to file an additional answer. The additional answer was filed and a replication filed thereto and the cause referred to the Master. After reference, the appellants, by leave of court, filed an amended answer in which they alleged that prior to June 21, 1930, Fred A. Smith was associated in business with one William A. Murray, now deceased. That the business consisted in buying, selling, leasing and renting of certain gambling devices, consisting of slot machines, roulette wheels, poker tables and other gambling devices to be used in gambling; that on said date, Murray sold to appellant his share and interest in the gambling devices for \$1,200, and that in payment, the appellants executed to Murray, a note in that amount; that the sole and only consideration was the share and interest which Murray had in the gambling devices and equipment; that for two years prior to the death of William Murray, appellants delivered and paid over to appellee Brown, Murray's share from the income, and profits derived from the operation of said gambling devices; that appellee knew that such income received by her for Murray was derived from said gambling equipment.

The amended answer then alleged the facts hereinbefore recited concerning the entry of the judgment and execution, and the execution of the note and trust deed; that at the time the appellee received the money to be applied upon the judgment and took the note and trust deed, she knew that the money was paid and the note and trust deed executed for a false, fraudulent and illegal consideration; that she was not entitled to said money, and that said note, upon which judgment was entered, and note and trust deed given in payment of gambling devices, was void and unenforceable; was contrary to statute and against public policy, and denied that appellee was entitled to the relief prayed for in her bill.

By an order entered February 1, 1934, the suit of appellants to set aside the note and trust deed was consolidated with the suit of appellee against appellants to foreclose the trust deed, and it was further ordered that the original bill was to stand as a cross-bill to the complaint in the foreclosure suit and that the demurrer filed to the original bill was to stand as a demurrer to the cross-bill. The demurrer to the cross-bill was sustained. Appellants excepted to the ruling of the court and elected to stand by their cross-bill. It was then ordered that the cross-bill in the fore-

closure suit be dismissed for want of equity and for costs.

The Master's report of testimony and conclusions was filed April 4, 1934, wherein the Master found that Lacy L. Brown was at the time of the filing of said bill, and is now, the legal owner and holder of the said note and trust deed. That there was due appellee from appellants upon note secured by the trust deed, \$1,076.64 and \$250 for attorneys' fees, making a total of \$1,326.64. That the equities of the cause were with the appellee and recommended a decree of foreclosure and sale. Appellants filed objections to the Master's report which were ordered to stand as exceptions thereto, and on a hearing in the Circuit Court on said report and the exceptions, the exceptions were overruled, the report sustained and a decree entered for foreclosure and sale, from which decree this appeal is prosecuted.

The facts involved in this case are substantially as set out in the pleadings and as recited above. Appellant contends that the original bill to cancel the note and set aside the trust deed which constituted a cross-bill in the foreclosure suit stated a cause of action and that the demurrer to the cross-bill should have been overruled and that their amended answer filed to the foreclosure suit was a defense thereto and that the exceptions to the finding of the Master should have been sustained. The answer to both of these contentions is to be determined by answering the question, was the sale of the slot machines and gambling devices by William Murray to the appellant, Fred A. Smith, unlawful. It is the contention of counsel for appellants that "the ownership of slot machines and other gambling devices being unlawful, and the use of them being unlawful, as a legal sequence of the sale of such slot machines and gambling devices, if not unlawful by the express provisions of the statute, is against the public policy of the state"; that the consideration for their sale, the note in this instance, secured by the trust deed, is void and unenforceable for want of valuable consideration, and rely upon Chapter 38, Cahill's Revised Statutes of Illinois, Sections 299 and 300, for authority for this proposition which they say is supported by the following cases: *Bobel v. People*, 173 Ill. 19; *Price v. Burns*, 101 Ill. App. 418; *Mills v. King*, 174 Ill. App. 559.

Counsel for appellants further say "That it was held in the *Mills Novelty Company v. King* that where slot machines are constructed so that they may be

used for money and permit of gambling, if the purchaser so wishes to use them, they are gambling devices, and not valid consideration for a promise to pay their purchase price." Examination of this case discloses that counsel has quoted exactly from the syllabus of the case but not from the opinion. In its opinion, the court did say, however, "Hence, to justify a finding for the plaintiff, the Court must have found that the preponderance of the evidence was against the defendant's claim that the machines were, in fact, gambling devices. In this we think the court erred. Such a finding is manifestly contrary to the evidence. The evidence of the witness Mills * * * shows that he admitted that the construction of the machines permitted gambling if the purchaser chose to use for that purpose. The fact that they could also be used for selling gum, and that Mills testified that he did not know for which of such uses they were in fact purchased, does not, we think, even tend to prove that the machines sold were not gambling devices." As the only question of law before the court in this case was whether the trial court erred in the admission or exclusion of evidence, it does not appear to us that this case is in strong conflict with subsequent expressions of the court since what it appears to have decided is that the evidence in this particular case indicated that the machines in question were actually gambling machines and that the fact that they might be used for two purposes does not prevent them from being gambling devices and that where the sale of such devices is prohibited they can not be valid consideration for a promise to pay. In the case of *Question Game Company, Inc., v. E. F. Ploner*, 273 Ill. App. 187, cited by appellees, which was a suit to recover the purchase price of certain punch boards that could be used for gambling or other purposes, the court said, "Defendant, to support his contention that the merchandise was of unlawful character for the purchase price * * * relies on paragraphs 299 and 300 of Chapter 38, Cahill's 1931 Illinois Revised Statutes." "This statute did not contemplate that the articles enumerated were unlawful per se as gambling devices, but declares in plain terms that the articles mentioned, or any others not specified, are and become unlawful if they are devices 'upon which money is staked or hazarded, or into which money is paid or played upon chance, or upon the result of the action of which money or other valuable thing is staked, bet, hazarded, won or lost' ". In the same opinion, the court further said, "It it not

sufficient to argue that the boards might be used for gambling purposes; so might a thousand other games. Practically every game for adults and children sold throughout the United States possesses potentialities for gambling, but their sale is not rendered thereby unlawful." This case was decided in 1933.

It should be noted that the cases cited by appellants which seem to support their contention, are all cases decided prior to the amendment of the statutory provisions in question in 1919, which made sales of such devices unlawful in certain counties only, and we are in accordance with the view taken by the court, since the amendment of the act in the Question Game case just cited, that the articles involved in the case at bar are not unlawful per se but could become unlawful if money was actually staked, or hazarded upon them, or if, as a result of their action or use, money or other valuable thing was staked or hazarded, and this was a matter of proof. But there is no evidence in this case that money was actually staked or hazarded on these particular machines, or that they were actually used as gambling devices after their purchase. It appears to us that the cases of *Frost v. People* 193 Ill. 635, and *People v. Lavendowski* 329 Ill. 223, cited by the appellants, relating to the constitutionality providing for search and seizure of gambling apparatus or implements, falls in line with the rule set out in the case of *Question Game Company, Inc. v. Ploner*, *supra* in that there is no doubt that such gambling devices are lawfully subject to seizure and destruction without violating any constitutional provision when they are determined to be gambling devices, but as pointed out, the determination of this question rests upon the interpretation of the statute as given in the Question Game case, that it must be shown that such machines or devices are actually used for the reception of money on chance or upon the action of which money is actually staked, hazarded, bet, won or lost and not machines or devices upon which this might be done.

Counsel for appellants further contend that the facts appearing in the record of the case at bar and the decisions of this court render the sale of the gambling devices by Murray to appellants unlawful but counsel do not call attention to or discuss the fact that the authorities cited are based upon the statute as it existed prior to the amendment of 1919, in which year the legislature amended the act so that the only provision making the actual sale of slot machines unlawful

is in counties in the State of Illinois in which there is a United States military post or a United States naval training station of the first class. (Cahill's Revised Statutes of Illinois, Sections 299 and 302, Chapter 38, the first of which counsel for appellant only quotes in part.) It is obvious from the Question Games case referred to above that the court, by inference at least, interprets the intention of the legislature from the statute as amended to be that the sale of devices such as those involved in the case at bar is lawful outside of counties prohibited by the statute. It must be shown that money or valuable thing was actually bet or staked upon them. It is significant, we think, that while the statute makes the use of such devices as involved in the case at bar unlawful if actually used for gambling purposes, the sale of such devices was clearly intended by the statute as amended in 1919 to be prohibited only in the classification of counties mentioned.

There is no evidence in the case at bar that the machines in question were sold in counties of the State of Illinois contemplated in Sections 299 and 302, and we, therefore, do not believe appellants' contention is sound, that the sale in this case is unlawful even though the seller Murray may have known that the buyer Smith intended to make an unlawful use of the machines sold. *Hoefeld v. Ozello*, 290 Ill. 147, in which the court said, "But the weight of authority in this country at least, is to the effect that mere knowledge of the seller that the buyer intends an unlawful use of the goods sold will not void the contract between the parties."

Appellants further contend that even if Murray sold articles that could be unlawfully used, that the sale was, therefore, unlawful. In most of the cases cited by appellants to support their contention, the seller was an active participant in acts that were specifically prohibited by the statute, such as gaming contracts and we do not see how these cases can be made applicable to the case at bar since the seller did not by his acts cause any of the devices in question to become unlawfully used. Appellants' counsel contend in their argument that Murray knew Smith would continue to use the machines sold, in the business of gambling, but there is no evidence of such knowledge in the record, or evidence that they were ever so used. Appellants say that even if the sale of such devices as involved in this case at bar is not specifically prohibited by statute still the sale was in aid of gambling and of operating,

keeping, owning and renting gambling devices, and the note given as consideration for said gambling devices was therefore void.

Here again counsel cite cases where the party seeking to recover is an active participant in a gambling debt. *Nash v. Monheimer*, 20 Ill. 215. And, therefore, against public policy, which case is so distinguished in *Hoefeld v. Ozello*, *supra*. It appears to us, moreover, that the rule laid down in *People v. Herrin*, 284 Ill. 368, that public policy is the principal of law that permits no one to do lawfully that which has a tendency to be injurious to the public or against the public good, would be applicable to this case only if the sale of such devices as Murray sold were specifically prohibited by statute in the county where sold. Clearly, under the rule in the *Question Game* case, where the court said that such machines were not unlawful per se as gambling devices, the sale of them could not be considered against public policy and injurious to public morals unless and until it was shown that they were actually used for the staking, hazarding or betting of money upon chance.

The only other question in this case is as to the proper remedy which the appellants should have followed in order to properly raise the question of lack of a valid consideration for the note upon which judgment was caused to be confessed by the appellee. An equitable remedy is given only where no adequate remedy at law exists. In the case at bar there was an adequate remedy at law which was a motion to open the judgment and for leave to plead and defend and the only excuse offered by the appellants for not doing this was that they were led to believe that unless they complied with the request of appellee, their property would be levied upon under the judgment. As the Supreme Court of this State said in the case of *Fish v. Cleland*, 33 Ill. 237, "A representation of what the law will or will not permit to be done, is one upon which the party to whom it is made has no right to rely, and if he does so, it is his own folly, and he can not ask the law to relieve him of the consequences."

We must conclude, therefore, that the appellants were guilty of laches in not filing a motion to open the judgment and for leave to plead and defend and that such a motion as could have been made after the rendition of the judgment in question is analagous to a motion to vacate a judgment obtained by default and the rule as to laches in default cases is applicable. *Kesner v. Truax*, 195 Ill. App. 285.

For the reasons given, we, therefore, believe that the trial court did not err in sustaining the demurrer to appellants' bill and in dismissing appellants' cross-bill for want of equity and that the court properly entered a decree of foreclosure for appellees. The decree of the trial court is, therefore, affirmed.

Decree affirmed.

(Eleven pages in original opinion)

retract.
petition filed - January 4, 1935 -
902

PUBLISHED IN ABSTRACT

Gertrude B. Chism, as Executrix of the Estate of
Walter P. Chism, Deceased, Appellant-Plaintiff,
v. Buske Lines, Inc., and William H. Meyer,
Appellees-Defendants.

Appeal from Circuit Court of Montgomery County.

OCTOBER TERM, A. D. 1934.

278 I.A. 635²

Gen. No. 8859

Agenda No. 21

MR. JUSTICE ALLABEN delivered the opinion of the Court.

This is a suit brought by Gertrude B. Chism, as executrix of the estate of Walter B. Chism, deceased, against Buske Lines, Inc., and William H. Meyer, for damages sustained on account of the death of Walter B. Chism which plaintiff alleges was due to an accident caused by the negligence or wanton and willful conduct of the defendants. The declaration on which the case was tried consisted of two original counts and six additional counts. The last two of said additional counts, alleged willful and wanton misconduct on the part of the defendants. The other eight counts alleged negligence.

As the suit was originally started there was another party defendant but that party defendant was dismissed out of the suit, and the proceeding was against the defendants named above. The six additional counts were filed more than a year after the death of plaintiff's decedent. The defendants filed a plea of the statute of limitations as to the six additional counts, to which plaintiff filed a replication. The trial court did not pass on this question, and inasmuch as there is no complaint in regard to these six additional counts this court will not pass upon that question, but will treat the counts as properly filed. The defendants filed to all counts a plea of the general issue, and an additional plea denying possession, control, use or operation of the truck that killed the deceased.

The evidence tends to show that on December 6, 1932, deceased and Robert Barnett in an automobile truck, loaded with sheep, hogs and cattle, started from Towanda, Illinois, to Chicago, about 7:15 p. m., on Route 4, a concrete highway; that when they reached a point a mile and a half northeast of Towanda there

was a collision between the truck of the deceased and a truck of the Akron-Kansas City Motor Freight Company, which was going south, whereby a part of the panelled body of the truck of the deceased, on the left hand side, and at the extreme top, was damaged; that deceased continued north with his truck, looking back, for a distance of a quarter of a mile or so; when he stopped his truck, headed north on the right hand side of the pavement. The outside edge of the rear wheels were in line with the outside edge of the truck body, with the rear left wheel on the black line, and the left front wheel two feet east of the black line; that the shoulders on both sides of the road at this point were soft and muddy; that after stopping, the deceased and Barnett, got out with a flash light, and deceased climbed to the damaged part at the top of the truck, where there was an opening about one and a half feet in length, caused by the collision with the Akron truck; that after deceased climbed up Barnett had the flash light; that the night was dark and damp; that lights were burning on deceased's truck; that Barnett was standing at the rear of the truck, in the path of cars coming south; that a truck came south at which Barnett flashed the light and the truck passed by; that to the rear of this truck, about forty or fifty yards, also going in a southerly direction, was the defendant's truck, going twenty to twenty-five miles an hour, which did not change its speed; that after flashing the light to the Buske truck Barnett yelled at Chism, and got behind the deceased's truck, but the Buske truck, driven by defendant Meyer, hit deceased when he was leaning over the top part of his truck; that no horn or signal was sounded, and Chism was thrown to the rear of his own truck, about twelve feet; his body flying over the back part of his truck and over the head of Barnett; that after striking deceased, defendant's truck ran south for a distance of forty or fifty yards. Chism at the time he was struck was standing eight or nine feet in the air, over the left rear wheel of his truck. Barnett warned Chism when defendant's truck was forty or fifty yards away.

The proof indicates that plaintiff's decedent died as a result of the injuries received, and that decedent was previously in normal health. The proof indicates that the truck was the truck of the defendant Buske Lines, Inc., and that William H. Meyer was driving same at the time the accident happened. It is in evidence that after the accident the truck of the decedent was driven north a quarter or half a mile where the

truck was turned around, and the truck then taken back to Towanda, without any repairs being made to the body, and that no animals were lost.

At the close of the plaintiff's evidence a motion was made on behalf of both defendants for a peremptory instruction finding the defendants not guilty generally, and as to each count. This instruction was given, and the jury accordingly rendered a verdict in accordance therewith; whereupon the Court denied a motion for a new trial and entered judgment against the plaintiff. It is from this judgment the plaintiff has appealed to this court.

On motion for a directed verdict on behalf of the defendants at the close of the plaintiff's evidence the plaintiff is entitled to the benefit of any evidence or reasonable inference from the facts proven viewed in the light most favorable to the plaintiff, and it is not the province of the court to weigh the evidence. All inferences in favor of the plaintiff which can be legitimately drawn therefrom must be given to the plaintiff. This is true even though the Court might be of the opinion that if the jury returned a verdict for the plaintiff it should be set aside, and if there is any evidence tending to prove any one count of the declaration it is error to direct a verdict. The court has no right to determine the weight of the evidence nor the credibility of witnesses.

In the case at bar we can find nothing in the evidence tending to show the violation of any duty owed by the defendant to the deceased, or any act upon the part of the defendant which could be construed as willful and wanton conduct. The rate of speed, twenty to twenty-five miles an hour, could not be considered excessive, nor was there anything which the defendants saw, or by the exercise of ordinary care should have seen which would cause them to slacken speed or stop; the position of decedent's truck was such that there was apparently plenty of room to pass by in the south bound lane of traffic. As a matter of fact the evidence shows that defendant's truck did pass decedent's truck without striking it, as did also one truck which preceded. How it could be expected that defendants would know or have any reason to believe that on the left side of the truck, and standing or leaning over the top of the same, eight feet in the air, there was a man, whose body projected over into the lane for south bound traffic we can not conceive from the evidence adduced, nor is it explained why Barnett was seeking to warn

approaching traffic from the north by standing behind the truck instead of in front of it. In this regard it is to be noted that in no count of the declaration does the plaintiff allege that defendant's truck struck decedent's truck.

It is elementary that in cases of this character there can be no recovery if plaintiff's decedent was guilty of contributory negligence. Section 145-F of an "Act to Revise the Law in Relation to Roads and Bridges," Cahill's Revised Statutes 1933, Chap. 121, Par. 121 (2) provides that every person operating a vehicle upon the hard roads of this State shall keep to the right of the center line and shall not stop or allow the vehicle to stand in such position that there is not ample room for two vehicles to pass on the road, except in case of emergency. The proof shows conclusively that plaintiff's decedent did park his truck in direct violation of said statute, but it is contended that he did so on account of the slight damage to the top of his car caused by his first collision with the Akron-Kansas City truck, which thereby caused an emergency stop. In construing this statute, Mr. Chief Justice Jones of the Supreme Court, when on the Appellate Bench, Second District said: "The exigencies which will excuse a person from leaving a car on the public highway in violation of the statute are those which give no choice to the driver about leaving his car in that position. Instances of such exigencies are an accidental break in machinery, a failure in the mechanism or parts peculiar to the car, a sudden blocking of the highway, etc." *Crawford v. Cahalan*, 259 Ill. App. 14. In the present case the accident with the Akron truck occurred fully a quarter of a mile south of the place where the plaintiff decedent brought his truck to a stop. This plainly shows that there was no exigency which gave no choice to the driver about leaving his car in that position. Why he stopped there, rather than before, is entirely unexplained. We will take it as true that the shoulders at the point where he did stop were soft and muddy; and possibly dangerous to drive upon, but there is no reason shown why plaintiff decedent could not have driven on further, until he reached a point where he could sufficiently withdraw from the concrete slab to comply with the statute.

Plaintiff's efforts to show that there was an emergency in that stock might escape are not convincing, when taken in consideration with the testimony of the witness Quinsel, who after the accident, and when no repair had been made to the damage drove decedent's

truck north a quarter or half a mile where there was a cross road, where he turned the truck around, and then drove same back to his starting point, Towanda, and no stock was lost. In the light of this testimony it seems clear to us that when plaintiff's decedent stopped where he did, and climbed on top of same to make the repair he knowingly violated the statute, previously referred to, and knowingly placed himself in a position of danger.

"A party has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution." *Beidler v. Branshaw* 200 Ill. 425.

The case of *James v. Motor Transit Management Company*, 260 Ill. App. 246, is cited by plaintiff in error in support of the contention that the trial court erred in directing a verdict. In our opinion this case does not support plaintiff's position: First, because the bus was left on the road on account of lack of gas, and the driver coasted as far on to the shoulder as he could. Then when the gas was supplied it was impossible to get the bus on to the road on account of the soggy condition of the shoulder and it was necessary to get a wrecker to pull the bus back on to the road. Meanwhile a car going in the same direction ran into the back end of the bus, which extended to either a greater or less degree across the right of way in which the bus was headed. There was some question whether or not the tail light was lit but the court determined that from the clear preponderance of the evidence the bus was visible.

In the case at bar there is no such emergency causing the stop as in the James case. There is no question but what defendants saw plaintiff decedent's truck but defendants did not strike decedent's truck, and there is absolutely no evidence that defendants did see plaintiff's decedent eight feet in the air on the left side of the truck, over the left rear wheel, or by the exercise of ordinary care could have seen this object. As regards the two wanton and willful counts there is no evidence that the defendants saw the deceased in time to avoid injury to him, or by the exercise of reasonable care could have known of the danger to which deceased was exposed, and willfully and wantonly injured him, or that with the conscious indifference to consequences willfully and wantonly drove their truck at a high rate of speed, or willfully and wantonly failed to give reasonable warning of approach to deceased. Where there is no evidence of willful, wanton and malicious conduct

it is the duty of the trial court to withdraw that question from the consideration of the jury. *Provenzano v. I. C. R. R. Co.* 357 Ill. 192, *Robbins v. Illinois Power and Light*, 255 Ill. App. 106. When the trial court can clearly see that the injury complained of was the result of the negligence of the party injured it should not hesitate to instruct the jury to return a verdict for the defendant. *Beidler v. Branshaw*, *supra*, *Wilson v. The Illinois Central*, 210 Ill. 603, *I. C. R. R. Co. v. Oswald*, 338 Ill. 270.

A careful analysis of the pleadings, and the proof, construed in the light of the decisions of our Supreme Court and Appellate Courts as to what is necessary to constitute liability in cases of this character leads us to the conclusion the trial court properly directed a verdict for the defendants at the close of the plaintiff's case. Judgment of the trial court is, therefore, affirmed.

Judgment affirmed.

(Nine pages in original opinion)

PUBLISHED IN ABSTRACT

In the Matter of the Estate of Mary C. Williams, Deceased, Cecil Hirsch, et al., Appellants, v. Elinor M. French, Administratrix etc., et al., Appellees.

Appeal from Circuit Court of McLean County.

OCTOBER TERM, A. D. 1934.

278 I.A. 635³

Gen. No. 8862

Agenda No. 24

MR. JUSTICE ALLABEN delivered the opinion of the Court.

Mary C. Williams, a widow, and a resident of Colfax, McLean County, Illinois, died testate on December 28, 1932. Her last will and testament is in words and figures as follows, to-wit:

"I, Mary C. Williams, of Colfax, Illinois, make this my last Will and Testament. I give, devise, bequeath my estate and property, real and personal, as follows, that is to say:

"First: All of my just debts and funeral expenses are to be paid.

"Second: To my sister, Clara Van Patten, I give, devise and bequeath Lot Six (6) Block Thirty One (31) Anderson's 5th Addition to Colfax, Illinois which is my home and all the contents therein, including furnishing and personal effects.

"Third: After the first two bequests of this my last Will are fulfilled it is my desire and request that All my legal heirs share and share alike in the remainder of my estate. Both real and personal.

"Fourth: I would appoint Clara Van Patten of Colfax, Illinois to act as executor of this my last Will and Testament, without Bond.

"In witness whereof I have signed and sealed and published and declared this instrument as my will, at Colfax, Illinois on this 4th day of June, 1920.

Mary C. Williams (Seal)"

Said will bears attestation clause in due form. Then follows a codicil, dated November 5, 1923, making three small money bequests. Inasmuch as there is no question raised concerning the codicil it is not set out. Said will was duly filed in the Probate Court of McLean County and admitted to probate. Clara Van Patten, the executrix nominated in the will qualified

as such executrix, and subsequently died. Elinor M. French was appointed, and qualified, as administratrix de bonis non with will annexed.

By order of heirship, entered in the estate of Mary C. Williams, deceased, the Probate Court found that deceased left no surviving spouse, and as her sole and only heirs at law Elinor M. French, a niece, who was the daughter and only descendant of Clara Van Petten, the executrix named in said will, which said executrix was the sister of Mary C. Williams, deceased; Frankie Penry, a niece, the daughter and only descendant of George Fletcher Frescoln, deceased, a brother of the testatrix; Cecil Hirsch, Jennie Flanders, and Edward Frescoln, nieces and nephew respectively of the testatrix and children of John Wesley Frescoln, deceased, a brother of said testatrix.

The estate was duly administered, and an order of distribution of the residuary estate presented by the administratrix de bonis non providing for a per stirpes distribution was entered by the Probate Court, from which order an appeal was taken to the Circuit Court by appellants. The Circuit Court entered an order directing a distribution of the residuary estate per stirpes, and from this order this appeal has been taken.

The only question is as to the interpretation of clause Third of the will which is as follows:

“Third: After the first two bequests of this my last Will are fulfilled it is my desire and request that All my legal heirs share and share alike in the remainder of my estate. Both real and personal.”

The only testimony offered by either side was that of John L. Barnes, a former banker, who testified that he knew the testatrix and had drawn the will involved in this case; that at her request he re-wrote this will, exactly like a previous one, except as to the bequest to Clara Van Petten, contained in the second paragraph; that the testatrix had said to him: “Roy, I want you to rewrite my will and make it just exactly as this one” (handing him her old will) “except that I want Clara to have the home place and everything in it.” The witness also testified that testatrix said nothing further about the will.

The prime rule for the interpretation of wills is to determine the intention of the testator as shown by the whole context thereof, but in the case at bar the will is so short, and the testimony so meager, that neither offer any aid to speak of in determining the intention

of the testatrix; so resort must be had to the rules of construction as applied to the words used in clause "Third".

Illinois is one of the states which incline towards a division per stirpes unless a clear intention to the contrary is shown. (*Dollander v. Dhaemers*, 297 Ill. 274; *Lee v. Roberson*, 297 Ill. 321; *Carlin v. Helm*, 331 Ill. 213; *Clark v. Todd*, 310 Ill. 361.

In the clause in question there is no conclusive language which would indicate a per capita construction of the clause. This, taken together with the further rule, which is well settled in this state, that where resort must be had to the statute of descent to determine who will take under the terms of the will, then and in such cases the Court has favored a stirpital construction. *Dollander v. Dhaemers*, *supra*. It follows that such rule must form the basis of distribution in this case.

Words indicating an equality of division, such as "equally", "to be divided equally", share and share alike" do not necessarily mean a per capita equality of division, but may be just as readily applied to a per stirpes division, and thus call for an equal division within a class, *Pitney v. Brown*, 44 Ill. 363. The clause in question in this case is possible, therefore, of two interpretations, either a per capita equality of distribution, or a per stirpes distribution, and since our courts are inclined to favor a per stirpes distribution in cases of ambiguity we are inclined to take that view of clause Third of the will in question.

Appellants draw attention to the word "All" in clause Third of the will, which is capitalized by the scrivener, contending that this word used in connection with the verbiage of the clause indicates an intention of a per capita distribution. The testimony is that this portion of the will, including the word "All", so capitalized, was copied verbatim from an old will, made some years before the will in question. In spite of the direct testimony of the scrivener, an inspection of the will as he testified it existed prior to his drawing the new will, which contained clause Second, would show a document which would be clearly incomplete, because eliminating the second paragraph of the present will the second paragraph would follow: "First: All of my just debts and funeral expenses are to be paid. Second: After the first two bequests of this my last will" and so forth. Clearly, the first paragraph was not a bequest, or even if it be so considered it could not be considered two bequests before the second para-

graph. There must have been some other paragraphs or bequests in the first will which were omitted from the second, and to which the capitalized word "All" may have had some special significance. What that significance may have been we cannot determine, but as used here it plainly refers to something which has been omitted, and is not entitled to the interpretation sought to be given by appellants.

For the reasons heretofore set forth it is our opinion that the order of distribution entered by the Circuit Court is correct, and that order is, therefore, affirmed.

Affirmed.

(Five pages in original opinion)

702
72 H
PUBLISHED IN ABSTRACT

John Deere Plow Company of Moline, a Corporation,
Appellant, v. R. H. Coorts and Thomas A. Scully,
Appellees.

Appeal from Circuit Court of Logan County.

OCTOBER TERM, A. D., 1934.

278 I.A. 635⁴

Gen. No. 8865

Agenda No. 27

MR. JUSTICE ALLABEN delivered the opinion of the Court.

Thomas A. Scully, defendant, was the owner of certain premises, which he demised to Mrs. Marie Diersing by a written lease, dated May 3, 1932, by the terms of which the premises were leased "for the term of one year, from and after the first day of March A. D., 1932, or so soon thereafter as the present tenant or tenants occupying said premises, or any portion of them, shall give possession of the same, and ending on the last day of February, A. D., 1933", and by this lease the lessee agreed to pay as rent on the 1st day of September, A. D., 1932, the sum of \$836, and on the 1st day of January, A. D., 1933, the sum of \$1,040. Indorsed on the outside of the lease were the following words, among others: "Begins March 1st 1932, ends February last, 1933". The same premises had been rented to the lessee by the defendant for a number of years previously, and the rent for the year proceeding the commencement of the lease in question had not been fully paid, there remaining due a balance of some \$793. During the year 1932 the lessee raised corn on the premises which was sold to the defendant Coorts, on August 29, 1933, and delivered to him on the 30th and 31st day of the same month. In 1930, the John Deere Plow Company, plaintiff, sold a tractor to lessee's son, Henry Diersing, and afterwards, on April 26, 1933, Henry Diersing and his mother, Marie Diersing, the lessee executed a chattel mortgage on the corn raised on said premises to secure notes given to the John Deere Plow Company. This chattel mortgage was expressly made subject to cash rent in the amount of \$161. The chattel mortgage was not foreclosed, nor the corn seized, nor any possession taken thereof by the mortgagee, but the sale of the corn hereinabove referred to was made not only with the

consent but at the request of the John Deere Plow Company to Coorts, who knew of the existence of the chattel mortgage, and also knew that the corn had been raised upon the lessor's premises by the tenant during the year of 1932. After Coorts bought the corn he mailed his check dated September 12, 1933, for \$300, payable to plaintiff.

Upon being served with a notice by the lessor that lessor was claiming a landlord's lien Coorts stopped payment on the check, and plaintiff's agent then served Coorts with a demand for the proceeds of the corn. Plaintiff then recovered judgment against Coorts before a justice of the peace for the proceeds of the corn purchased by him. Appeal was then taken to the Circuit Court of Logan County, Illinois, at which time a stipulation was entered into between the plaintiff, John Deere Plow Company, Thomas A. Scully, intervenor, and R. M. Coorts defendant whereby all parties agreed that there was involved in the trial of this cause the proceeds of corn raised in the year commencing March 1, A. D., 1932, upon the premises owned by Thomas A. Scully; that Thomas A. Scully claimed a landlord's lien against said corn; that it was desired to settle said claim in one litigation, and it was, therefore, stipulated, that Scully might appear as intervenor in the cause, that it be heard as if the defendant Coorts had filed his bill of interpleader with the payment of said money into court; that the claims of the plaintiff and of Scully should be considered pleaded; that all defenses to the claim of either party, and all replications or traverses be considered pleaded; that the cause be heard by the Court without a jury, and that such order and judgment be entered by the Court as if the case arose on a bill of interpleader, and a decree entered on such bill. Trial was had and the Court found that Scully had executed a written lease to Marie Diersing for the premises in question for the term of one year, as hereinbefore set forth; that certain corn raised upon the premises was received by the defendant Coorts on August 30th and 31st, 1933, sold by him and converted into money; that the proceeds of the sale after deducting certain charges and expenses, incident to said sale, amounted to \$461, which said sum the said Coorts had paid into Court. The Court further found that the defendant Coorts prior to and at the time he received delivery of the corn knew that it was subject to the lien of Thomas A. Scully for rent, which said lien continued for the full term of six months after the last day of February,

A. D., 1933; that the actual rent due from the lessee to Scully for the term of the lease was \$836; that the chattel mortgage to the John Deere Plow Company was and is subject to the landlord's lien; that the defendant, Coorts, before the expiration of said lien, and with knowledge thereof, prevented said Scully from enforcing it, and thereby deprived him of his said lien, and he is liable to said Scully for the unpaid rent which was in excess of the amount of \$836; the Court further found that the costs incurred in the justice court and in the Circuit Court should be paid out of the amount in the hands of the clerk. The court then entered judgment in favor of Thomas A. Scully and against the defendant, Coorts, in the amount of \$447.05 to be satisfied out of the \$461 paid into court; that John Deere Plow Company take nothing, and that Coorts be discharged of any liability to account to any of the parties. From this judgment the plaintiff, John Deere Plow Company appeals.

The two questions involved in this case are, first, whether the landlord, Scully, had a landlord's lien which extended after the time the corn was sold to Coorts, and second, if the lien is good, for what amount. Plaintiff contends that the lien had expired on the 27th day of August, 1933, arguing that the computation of time under Chapter 80, Section 31, Cahill's Illinois Statutes, which reads in part: The landlord's lien "shall continue for the period of six months after the expiration of the term for which the premises are demised", means in the case at bar that the period shall extend from the 28th day of February, 1933, to the 28th day of the sixth month following, less one day, and cite as authority the case of *Irving v. Irving*, 209 Illinois Appellate 318, wherein the court used the following language: "in computing time by the calendar year, days are not counted, but the calendar is examined and the day numerically corresponding to that day in the following year is ascertained, and the calendar year expires on that day, less one." The language in this case when applied to the facts of the case at bar seems to us to mean that if the six months' period were to be calculated from February 28, 1933, it would be six full months following that day, less one day, or August 31, 1933. There is nothing in the language of the *Irving* case that indicates that the Court would in this case decide the six months' period to be actually five months and twenty-seven days. The lease in the case at bar expired at midnight on the last day of February, which was February 28th, and therefore,

in computing the six month or half year period provided by statute, the calculation is made from the 1st of March to the 1st of the succeeding month, and so on, for six months, less one day, so that the lien expired on midnight of August 31st.

Counsel for appellant rely strongly upon the language used in the case of *Lawrence v. Elmwood Elevator Co.* 258 Ill. App. 101, 104, where the present Chief Justice of the Supreme Court said: "The lease expired March 1, 1927. The lien therefore expired August 31, 1927." An examination of the case discloses that the question of the exact day when the lease expired was not in question, the property having been disposed of a considerable time prior thereto. However, in our opinion, it correctly states the rule, and is in no wise in conflict with our views already expressed. The other cases cited by counsel for plaintiff in no way differ from the holdings in the Irving case, as previously set forth, and are not in conflict with our views in this case. The opportunity of the landlord to enforce his lien was interfered with by the acts of Coorts before the expiration of the lien, and thereby Coorts became liable to the landlord. The authorities cited by the defendant in support of his proposition that the landlord lost his lien by failure to exercise it within the period provided by statute are not applicable in view of our previous holding.

Plaintiff's second contention is that the lease in question provided for a greater lien than the statute gives, on the theory that plaintiff was attempting to establish his lien for a previous year's rent would be true, if that were the situation in the case at bar, and with the cases cited we have no quarrel. However, in the case at bar the lease provided for a certain amount of rent for the year in question, and the fact that part of this rent may have accrued in the previous year does not support the contention that the landlord was claiming a lien for a previous year's rental. There was nothing in the lease to show that it was for a previous year, and there is nothing so far as this court is concerned that is illegal or against public policy or infringes upon the rights of any parties when they enter voluntarily into a contract for a certain amount of rent which may be more than the land would ordinarily rent for per acre. In the case of *Prettyman v. Unland* 77 Illinois 206 cited by appellant to substantiate his contention that a previous year's rental would not be a basis for the landlord's lien in the case at bar, we direct atten-

tion to the fact that in that case the rent for the year 1871 was not fully paid but such rent was not made a part of the rent for the year 1872, and that after the lease, commencing March 1, 1872, was executed the parties by separate agreement, which was no part of the lease for that year, entered into an agreement which was indorsed upon the back of the lease for 1872, specifying that in addition to the rent for that year the tenant was to pay to the landlord on the same terms a certain sum of money, being the unpaid rent for the previous year, and the mere fact that it was made payable at the same time as the rent for 1872 did not in our opinion make it a part of that lease. As previously pointed out the previous year's rent was included in the total amount reserved for the year 1932-1933, and was incorporated in the terms of the lease for that year, without any reference whatsoever being made to the failure to pay the previous year's rental.

In our view the finding of the trial court that the defendant, Coorts, was liable to the defendant Scully for the amount he received from the sale of the corn in question, because landlord Scully's lien had been interfered with before the expiration of the lien, and that the plaintiff, John Deere Plow Company, take nothing, was correct. Therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

(Seven pages in original opinion)

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Yes on appeal - January 4, 1935 -
PUBLISHED IN ABSTRACT

**Porter Fox, A. H. Skelton, Plaintiffs, Appellee, v.
Achille F. Lete, Everett E. Smith, Defendants,
Achille F. Lete, Appellant.**

Appeal from Circuit Court, Vermilion County.

OCTOBER TERM, A. D. 1934

278 I.A. 636

Gen. No. 8868

Agenda No. 30

MR. JUSTICE ALLABEN delivered the opinion of the Court.

This is a bill in equity brought by Porter Fox, and A. H. Selton, against Achille F. Lete and Everett E. Smith. The bill charges in substance that on August 12, 1933, complainant, Porter Fox, owned 74 acres of land in Vermilion County, and on that day entered into a contract in writing for the sale of the same to the plaintiff, A. H. Skelton, upon the following conditions: Purchase price \$2,773.68, payable as follows: \$673.68 cash, on the signing of the contract, and \$400 on the 1st day of April for each of the years 1934, 1935, and 1936, and the balance of \$900 on April 1, 1937, with interest at 6 per cent on all deferred payments; taxes and special assessments subsequent to the year, 1933, to be paid by the purchaser; authorizing purchaser to dig coal on a 25 cent per ton royalty, payable each month; at which time a full report of the coal dug and taken out was to be made, and the payments of royalty to be applied on the purchase price in addition to the stipulated payments to be made; contract provided for forfeitures on failure to make the payments; that the purchaser should have sixty days of grace to make payments due on the contract, purchaser was to procure insurance on the buildings against fire, lightning and tornado, to their insurable value, to be issued in the name of the vendor and deposited with the vendor with loss payable to both as their interests appear; that time was of the essence of the contract.

Bill further alleges that upon the execution of the contract premises were delivered to Skelton by Fox and Skelton entered into possession, and has continued in possession; that defendant, Lete, was the owner of land adjoining on the west side of premises conveyed by said contract where Lete had constructed a deep

shaft for the mining of coal upon his own premises; that there were two veins of coal upon the premises sold to Skelton by Fox, one a few feet under the surface, capable of being strip mined, and a second, many feet under the ground capable of being removed by deep shaft mining; that Lete had constructed certain entry ways from the deep shaft mine on his own land, and crossed on to the land owned by the plaintiff, and was removing coal from under the land of the plaintiffs, taking the same out by means of underground entry ways to a tipple on his (Lete's) land, and converting said coal to his own use; that Lete was continuing to trespass from day to day and threatened to continue the same; and that unless Lete was enjoined he would continue to commit said trespasses and remove said coal; that to recover damages occasioned by said trespasses would require a multiplicity of suits and that the plaintiff had no adequate remedy at law, for the reason that such multiplicity of suits would make excessive costs in the collection of such damages. Complaint further charges Lete had no right whatsoever in and to the real estate owned by the plaintiff, or the coal thereunder; that the legal title was in Fox and the beneficial title in Skelton; that Lete was removing the coal without any right or authority and would continue so to do unless restrained by a decree of this court, thereby causing irreparable damage to the plaintiff's property, that the plaintiffs had no sufficient remedy except in a court of equity.

Complaint asks that Lete and his agents and servants be restrained from making said repeated trespasses and from further digging and removing coal from the premises. The complaint further alleges that Everett E. Smith is in possession of a portion of the premises therein described but has no interest therein except subject to the rights of the plaintiff. Prayer for relief is that the court find that the plaintiffs are the legal and beneficial owners of the real estate, that Lete has no right, title or interest therein, no right to remove coal from the premises, that Lete be restrained and enjoined from so doing, and that an account be taken and damages be awarded plaintiff for said trespasses, and that a temporary restraining order issue forthwith.

Defendant Lete's answer was as follows: Admits the allegations in paragraph 1 of complaint; admits his ownership of the land adjoining the premises described in the complaint, admits that he operated a deep shaft mine and that there were entry ways and rooms in the

coal underlying the land described in the complaint; that he had taken possession of said lower vein of coal but denies that he was a trespasser, and denies that he was taking it wrongfully and without authority; also denies the beneficial title to said premises was in Skelton; defendant then sets forth a counter claim alleging the following:

That on April 30, 1932, Porter Fox was the owner of the above mentioned real estate, and made an agreement to sell the same to Everett Smith, defendant, on the following terms; Purchase price \$3,000, payable \$250 cash in hand, \$250 within six months, and \$400 on the 1st days of April of the years 1933, 1934, 1935 and 1936, and the balance, \$900, on April 1, 1937, with annual interest at 6 per cent on all deferred payments, and that all taxes and special assessments subsequent to the year 1931 be paid by purchaser. Purchaser allowed to remove coal, but to pay 25 cents per ton as royalty on each ton removed, and make a report each month of the coal taken, and pay royalty at that same time; said royalty payments to be applied to the purchase price in addition to the stipulated payments. That Lete had rendered assistance to purchaser and that purchaser, Smith, had a right to transfer and assign the contract to Lete; that the contract contained a provision of forfeiture upon failure to make payment, or perform any of the covenants; purchaser to have sixty days grace in which to make payments on the contract; purchaser to procure insurance on the buildings, against fire, lightning and tornado to their insurable value, all payable to the vendor, and vendee, as their interest might appear, policy to be held by vendor; time of payment to be the essence of the contract.

Counter claim further alleges that upon execution of said contract Smith entered into possession of the real estate. That on March 26, 1932, Smith borrowed from Lete \$250 in order to make the initial payment on the above contract with Fox, and made a contract with him, Lete, to sell, transfer and convey, all minerals under said property below what is known as Number 7 Vein, except 10 acres on which the residence and out buildings were located. Also agreeing further that if Smith found himself unable to complete payments on his contract he would assign his contract with Fox to Lete before the sixty days of grace expired. And further, that as soon as he, Smith, had title to said premises he would by warranty deed, convey to Lete all minerals underlying what is known as Vein 7.

Counter claim further alleges that after the execution of the foregoing contract between Smith and Lete, Lete entered into possession of the vein of coal under Vein 7, known as Vein 6, and began mining operations in said vein, and has since that time retained possession of said Vein 6, all of which has ever since been known by the plaintiff; that ever since the execution and delivery of said contract Lete has been ready and willing to assume the terms of the agreement of April 30, 1932, between Fox and Smith, and to comply with all terms thereof. That on December 23, 1932, C. H. Mielke, the agent of Fox, wrote a letter to Lete that the \$250 due on October 30th, had not been paid, and that he, (Mielke) was so notifying him (Lete) in accordance with his previous conversation. That after the said notice Smith made the payment of the said \$250, due on October 30, 1932, but failed to make the payment of \$400 due April 1, 1933, whereupon Smith called upon Lete to make payment of the interest due at that time, representing that Fox would wait until fall for the April 1st payment of \$400 if the interest was paid; that on June 8, 1933, Mielke wrote Smith a letter that Fox would extend the payment of \$400 principal if the interest were paid; that Smith conferred with Lete and an agreement was prepared between Smith, Lete and Fox, which was signed by Smith and Lete providing that Smith was in default under his contract with Fox, and that Smith would agree to convey 16- $\frac{3}{4}$ acres of land to Lete, and Lete agreed to pay Smith \$500 therefor on the following terms: \$150 cash and \$350 on November 15, 1933; and that if Smith failed to pay Fox, Lete would agree to pay Fox, but not as provided for in the agreement, but that Fox should give him (Lete) a reasonable time to complete the payment; further, that Smith would deed the 16- $\frac{3}{4}$ acres to Lete when all the payments had been made to Fox; that said agreement, together with a check for \$150, signed by Lete and payable to Smith, and by Smith indorsed was sent to Fox, and by him returned unsigned.

Counter claim further alleges that after the signing of the above agreement by Smith and Lete, Lete went into possession of the 16- $\frac{3}{4}$ acres of land, and has continued in such possession from thence hitherto, all of which was known to plaintiffs, Fox and Skelton; that Lete had at all times been ready to assume all the obligations of the original Smith-Fox contract of April 30, 1932; that he is still ready, able and willing so to do. That Lete conferred with Fox in Chicago, after

signing of the Fox-Skelton contract; that Fox informed Lete that he knew of Lete's intention to take over the contract, but was informed that Lete was unwilling to take over the contract, which said information defendant alleged is untrue.

That Skelton by stealth, unfair representations, and deceptions, and by underhanded and fraudulent contriving, maliciously induced Fox to enter into the agreement with Skelton. Counter claim prays that the Fox-Skelton contract be set aside, that an accounting be made of the coal removed by Skelton, and damages be awarded Lete for same, that Skelton be enjoined and restrained from trespassing on said premises, or mining or removing coal therefrom, and that the right of Lete to complete the Fox-Smith contract be established by the decree and that plaintiff's suit against defendant Lete be dismissed.

Plaintiffs, Fox and Skelton, filed a reply to Lete's counter claim as follows: They admit that the contract was entered into between Fox and Smith on April 30, 1932; that Smith entered into possession of said real estate; and deny that Smith and Lete made the contract of March 26, 1932; also deny that Mielke was the agent of Fox; but admit that Lete entered into possession underground of Vein 6, and mined coal therefrom, and aver that the same was done without lawful right or authority. They deny that the plaintiff at any time prior to the execution of the contract between Fox and Skelton had knowledge that Lete was mining Vein 6 of the coal. Plaintiffs further deny that Lete has always stood ready to assume the terms of the agreement of April 30, 1932, between Fox and Smith, and make the payments as therein agreed to, and also aver that said allegation is immaterial, and such fact, if it be a fact, gave Lete no right under said counter claim, and aver that Mielke was not the agent of Fox and had no authority to bind Fox in any way. Plaintiffs admit Smith made a payment of \$250 on the contract, but admit that he failed to make payment of \$400 due on April 1, 1933, and aver that he also failed to pay interest and taxes as provided in said contract; admit that the check for \$150 was tendered as alleged in the counter claim, but allege that said check was refused acceptance by Fox. Plaintiffs admit that Smith was in possession of the 16 $\frac{3}{4}$ acres of land, but aver that at the time of the entering into the agreement between Fox and Skelton that Fox was in possession of all of said land. They aver that Lete did not make the payment of interest and principal on pay-

ments as they became due under the contract, and did not pay the taxes therein required, and that the same was in default for more than four months when the contract between Fox and Skelton was made. Plaintiffs aver that Smith never did assign his contract of April 30, 1932, to Lete, but, on the contrary, on August 12, 1933, cancelled said contract and surrendered the same to Fox. They deny all the allegations that Skelton by stealth, and unfair representations and deceptions, or otherwise, induced Fox to enter into the agreement of August 12, 1933. Plaintiffs aver that when Skelton entered into the contract with Fox on August 12, 1933, that he knew of the surrender of said contract by Smith to Fox, dated April 30, 1932, and that he entered into said contract with Fox in good faith and without notice of any other person having any legal right whatsoever in said contract, and deny all other matters set forth in the counter claim, and pray that the counter claim be dismissed for want of equity.

Everett E. Smith's answer to counter claim of Lete was as follows: Adopts and makes as his own answer the answer filed by Fox and Skelton, as set out above, and further says that Lete is not entitled to have the Fox-Smith contract of April 30, 1932, completed because Smith cancelled said contract and surrendered the same to Fox, and that Lete is not entitled to any of the relief prayed for in the counter claim, and for answer to the original bill admits all matters therein set forth.

The facts as shown by the evidence in the record correspond in great measure with the allegations of fact contained in the original bill, the answer thereto, and the counter claim. The Smith-Fox contract for deed is as set out, also the Skelton-Fox contract is as set out. The matters of the default of Smith on the Smith-Fox contract are also correctly stated.

Lete insists that Mielke was the agent of Fox. The evidence shows that Mielke was a real estate agent with authority to find buyers for land owned by Fox in his vicinity, and submit these offers to Fox for approval. It appears that contracts were not completed until accepted by Fox, and that while Mielke sometimes collected payments he was not supposed to do so; that when extensions were desired the matter was taken up with Mielke, who submitted the proposition of extension to Fox. It further appears from the evidence that when the so-called "three way contract", together with the check was brought to Mielke's office,

he in no way passed upon the same, but forwarded check and contract to Fox for his approval. This is entirely inconsistent with the idea that Mielke was the agent of Fox; so that notice to Mielke, or any knowledge that Mielke may have had could not bind Fox. The Fox-Smith contract was never assigned to Lete, but prior to the execution of the Fox-Skelton contract was cancelled by Smith and returned to Fox.

When Lete made the so-called "three way agreement" whereby he was to buy $16\frac{3}{4}$ acres of land for \$500, and added that he would carry out the payments to Fox that were due from Smith on the original contract, if Fox would give him a reasonable time to complete the payments, and had this sent together with a check for \$150 to Fox he did not assume, or state that he would assume the Smith-Fox contract, but attempted to make a new contract in place thereof, which, of course, could have no binding effect until assented to by Fox.

It appears that Fox was away from home at the time these documents were submitted to him, but that as soon as he returned and was apprised of them he returned both contract and check, without signing the contract, or cashing the check. To contend that this new offer on different terms, which was unsigned by one of the parties to it, could have any binding effect on any of the parties seems unreasonable. In fact, the return of the contract unsigned, and of the check speaks for itself. It is true that on August 11, 1933, Lete and his attorney were in Mielke's office and Lete there said that he would take over Smith's contract and deal with Smith direct, and would pay up the note that was due in April, and see that all future payments were cared for at the regular time. Mr. Fox was notified by letter of that date to that effect. However, there is no evidence in the record that Lete ever did at that time go to Smith and tender him the money then in default and demand that the contract be assigned to him, or tell Smith that he would pay the money then in default, to Fox; and take over the contract. It might be well to call attention to the fact that the sixty days of grace under the Smith-Fox contract expired on May 30th, and that between that time, and the making of the Fox-Skelton contract, on August 12, 1933, Lete had at no time complied with the terms of the Smith-Fox contract.

The only offer or tender of payment which he made was during the actual trial of the case. During all this

time he was removing coal from under this land claiming the right to do so under the original agreement.

Lete's answer to the complaint admits the first allegation of the complaint which sets out, among other things, that Porter Fox was the owner on August 12, 1933, of the 74 acres of land in dispute, and that he made the contract on that day with Skelton.

Lete claims that he was in actual lawful possession of all coal and minerals below Vein 7 under 64 acres of the land in controversy, as well as $16\frac{3}{4}$ acres of the surface, and could not be evicted without first having been served with statutory notice to vacate, as provided under Sections 2 and 3, Chapter 57, Smith-Hurd Revised Statutes. It is elementary that forcible entry and detainer determines possession and right to possession, and that title or the right to title is not involved and cannot be inquired into. *Universal Vending Service Company v. Tony De Meo*, 231 Ill. App. 30. In this bill in equity the court is asked to find who are the legal and beneficial owners of the real estate in question. Nowhere has the defendant Lete questioned the jurisdiction of a court of chancery, but in addition to answer the bill has filed a counter claim in equity. Our Supreme Court held in *McGuire v. Boyd*, 236 Ill. 69, that where there are repeated trespasses in taking coal from another's land it is proper to go into a chancery court and assess damages for the coal that has been taken. That case is also authority for the proposition that the measure of recovery is the value of the coal at the mouth of the pit less the cost of conveying it there from the place where mined.

The evidence shows that 540 tons of coal were taken out before the surrender of the Smith contract; that 956 tons were taken out after that time. The trial court found that the defendant in removing the 540 tons of coal during the life of the Smith-Fox contract, acted in good faith and not as a trespasser, and only required that he pay therefor 25 cents per ton as provided for in the Smith-Fox contract. This amounts to \$135. As to the 956 tons, guided by the rule set down in the McGuire case, the court found that the defendant Lete should pay \$1.75 per ton for the 956 tons removed after the cancelation of the Smith-Fox contract. This amounts to \$1,673, or a total of \$1,808. In this the court is amply supported by the evidence.

There are certain charges of fraud and unfair dealing on the part of Mr. Skelton, but no evidence was produced which supports these charges. The court by its decree found that Lete had failed to prove the alle-

gations of his counter claim, and that the equities under the counter claim were with the plaintiffs, Fox and Skelton, and that said counter claim should be dismissed for want of equity. The court further found that all the material allegations to the original bill of complaint had been proved, and that the equities of the case were with the plaintiffs therein; that plaintiff, Fox, is the owner of the real estate described in the original bill, and that Skelton had a valid contract for the purchase of said real estate from Fox; and that Lete without any lawful right or authority trespassed upon the said real estate, in the bill described, and by means of a deep shaft, entry way, had mined and removed coal therefrom as alleged in the bill, and assessed plaintiffs' damage at \$1,808, and cost of suit; and dismissed the counter claim, and entered a decree according to the findings, and permanently enjoined and restrained Lete from the further trespassing upon said land, and from removing coal therefrom.

For the reasons heretofore set forth, we are of the opinion that the decree of the trial court was correct, and the same is hereby affirmed.

Decree affirmed.

(Thirteen pages in original opinion)

14, 1925
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PUBLISHED IN ABSTRACT

W. S. Hardwick, Plaintiff and Appellant, v. Illinois
National Bank of Springfield, a Corporation,
Defendant and Appellee.

Appeal from Circuit Court, Sangamon County

OCTOBER TERM, A. D. 1934

278 I.A. 636²

Gen. No. 8873

Agenda No. 33

MR. JUSTICE ALLABEN delivered the opinion of the Court.

This is a suit brought by W. S. Hardwick, plaintiff, against the Illinois National Bank of Springfield, Illinois, defendant, for money had and received in the amount of \$2,100. The declaration consisted of the common counts, and an additional count setting up that on May 16, 1933, plaintiff entrusted and delivered to M. Salzenstein & Company, his check for \$2,100, payable to M. Salzenstein & Company, drawn on the First National Bank of Beardstown, Illinois, for the express purpose of buying a Chicago bank draft, for the purchase price of 300 shares of stock of Dick & Bros. Quincy Brewery Company, at \$7 per share; that M. Salzenstein & Company, as his agent, delivered this check to the Illinois National Bank, with the request that it issue a Chicago draft; that the bank refused to issue a draft and it wrongfully and unlawfully converted to its own use moneys of the plaintiff of the sum of \$2,100, which in equity and in good conscience belonged to the plaintiff.

The Bank filed a plea of non-assumpsit. Trial was had before a jury, and at the close of the plaintiff's evidence, on defendant's motion, the court instructed the jury to find the issues in favor of the defendant. The jury, in accordance therewith, returned such a verdict, and the court then entered judgment on the verdict, that the plaintiff take nothing. It is from this judgment that the plaintiff has appealed.

The evidence is substantially as follows: On May 16, 1933, plaintiff gave Salzenstein & Company a check for \$2,100, payable to Salzenstein & Company, and drawn on the First National Bank of Beardstown; that same was for the purchase of 300 shares of Dick & Bros. Brewery stock, at a price of \$7 per share; that

Salzenstein & Company did not have the stock but were to use the check to get the stock through a bank in Chicago; that on May 17, 1933, Marie Mathias, an employee of Salzenstein made a deposit with the defendant bank through Mr. Grant, in the name of M. Salzenstein & Company of the following items: Currency \$45; American National Bank, \$161.90; C. W. Anderson, \$700; Continental Bank and Trust, \$181.25; W. S. Hardwick, \$2,100; J. J. Koeper, \$105; Manufacturers Trust, \$82.50; Total \$3,375.65. She had with her a check for \$2,762.50, signed by Salzenstein & Company and payable to the Illinois National Bank, which she presented to Mr. Primm and requested a draft in the sum of that amount, payable to Robert Drumm of Chicago; that the draft was issued but was taken to Mr. Luers, assistant cashier, who then asked to see Miss Mathias. He had the checks deposited by Salzenstein & Company that day laid out in front of him, including plaintiff's \$2,100 item. He stated that he could not issue the draft because there were checks contained in the deposit drawn on the Beardstown bank, and it would take two, three, or possibly four days to clear those checks, and he would not issue a draft until they had cleared. He asked Miss Mathias if she could not send a check and she told him that it was in payment of stock and must be in Chicago the next day, and the company had requested that all orders be accompanied by a draft. Miss Mathias called Mrs. Dougherty, another employee of Salzenstein for directions, and Mr. Luers talked to her, saying practically the same thing that he had said to Miss Mathias. Miss Mathias told Mr. Primm, who had the draft, that she was not going to take the draft and when questioned as to what Primm should do with the draft said: "Well, I don't know." Miss Mathias had frequently purchased Chicago drafts for Salzenstein, payable to Robert Drumm. The Anderson check of \$700 which was in this deposit was also payable to Salzenstein and given to them for payment for Dick & Bros. brewery stock. On the face of the Anderson check, in the lower left hand corner were the words "Brew Stock".

The evidence further discloses that Salzenstein & Company had been indebted to defendant on several notes totalling approximately \$35,000, for perhaps two years; that the interest on these notes was in default, and that the bank applied the items on the deposit slip, including the \$2,100 obtained on the Hardwick check, on the Salzenstein indebtedness; that at no time within

three months prior to May 17, 1933, had Salzenstein had any such amount of money on deposit; that the items of Salzenstein's indebtedness to the defendant were a note of \$12,227, dated October 24, 1932, a note of \$13,050, dated November 14, 1932, due 90 days after date, and a 90 day note dated September 12, 1932, of \$20,900; that the deposit in question was larger than the usual deposit, and that with the deposit of May 17, 1933, Salzenstein & Company had an account of \$4,075.02, which was the largest deposit they had had during the period of their account, but they had a good portion of it. One time there was considerably more put in than taken out, about twice as much.

The evidence further shows that the Salzenstein note to the defendant bank for \$13,050 was a collateral note with the par value of the collateral listed at \$20,000, valued at \$15,000, and that the \$20,900 note lists on the face of it stocks and bonds pledged which the maker values at \$15,000, and that the note was also secured by collateral listed on other notes; that the officers of the bank determined to appropriate the amount which appeared on deposit to the account of Salzenstein on May 19th, and that plaintiff's check was paid by the First National Bank of Beardstown, on May 18, 1932.

It is contended by the plaintiff that the trial court erred in directing a verdict for the defendant at the close of plaintiff's evidence. In considering such a motion the trial court should place that construction on the evidence most favorable to the party against whom the motion is made, and give to that party also inferences most favorable to the party against whom the motion is made; and it is only where there is no "evidence" upon which the jury could, without acting unreasonably in the eye of the law decide in favor of . . . the party producing it," that a verdict may be directed. *Offutt v. World's Columbian Exposition Co.*, 175 Ill. 472.

In this case the plaintiff's check was made payable to Salzenstein without qualification, nor are there any words on the check which would in any wise indicate that Salzenstein were not the owners of the proceeds. As to the other items included in this deposit the same is true, except that the Anderson check bears the notation in the lower left hand corner of the face, "Brew Stock"; that this would qualify the ownership of the proceeds in any way or put any one on notice that there was anything peculiar about the giving of the check seems to us a strained and unnatural contention.

The act of Salzenstein's agent, Mathias, in making

the deposit with Mr. Grant, as if the various items deposited were the sole property of Salzenstein, with all items listed in the same way, certainly did not indicate, and would give no notice to any one that the proceeds of the various checks were not the sole property of Salzenstein and to be held and used in any way that they should direct.

The further act of the agent Mathias in presenting to Mr. Primm a check signed by Salzenstein and payable to the bank for \$2,762.50 would indicate that all of the items deposited (for without these items the bank account would not justify such a draft) were the sole property of Salzenstein. We particularly direct attention to the fact that the amount for which Miss Mathias sought to get a draft was \$2,762.50, which in no way corresponds to plaintiff's check of \$2,100, nor to Anderson's check of \$700, nor to the sum total of those two, or to any other combination of the various items listed on the deposit slip. We are at a loss to determine how the defendant could have known or could have been put upon notice that plaintiff's check of \$2,100 was to be used for the purpose of buying a draft to buy stock for him by the attempt to buy a draft for \$2,762.50, or to buy stock for plaintiff and for Anderson. After Miss Mathias asked for the draft, and the same was made out she was referred to Mr. Luers who explained that the draft could not be issued until after Hardwick and the Anderson items, totalling \$2,800 had been collected from the Beards-town bank, in two, three or four days. Then followed a conversation between Miss Mathias and later Mrs. Dougherty, over the telephone, in which it was explained that they wanted to send the draft to Chicago to buy stock, and also the reason why the bank would not issue the draft. Not one word was said by either Miss Mathias or Mrs. Dougherty for whom this stock was to be bought or any explanation made that the money was to be used to purchase stock, for any one, other than Salzenstein, nor was anything said which would indicate that the stock was being purchased for anyone other than the ostensible purchaser, Salzenstein. After this conversation nothing was done further about the draft and Miss Mathias left, saying that she did not know what they would do about it.

The items were duly collected and paid on May 18th, as shown by the paid stamp on both checks, and credited to the account of Salzenstein. On May 19th the bank determined to apply the money in Salzenstein's account on their indebtedness to the bank.

It is the well recognized rule in Illinois that a bank may apply money held on general deposit on the indebtedness of the depositor to the bank. And this even though the money may have been the property of a third person, provided the bank had no knowledge or notice of the fiduciary character of the funds existing between the depositor and a third party who furnished the money. *Kamfner v. Auburn Park Trust and Savings Bank*, 344 Ill. 200. It is urged that even though this be the rule as set forth above that the amendment of 1931, (Cahill's Statutes 1931, Chapter 16-A, Section 26) which provides "where an item is deposited or received for collection, the bank of deposit shall be agent of the depositor for its collection" should apply here because the bank refused to issue the draft until the two items drawn on the Beardstown bank had been collected. It is very doubtful from the evidence that these items were left for "collection". This matter is fully discussed in the case of *McQueen v. Randall*, 353 Ill. 231. However, that case is also authority for the proposition that "The act of 1931 only changes the point (in time) respecting the deposit and collection of instruments payable in money when the bank gains title to the proceeds of such instruments." Under the old law the bank gained title to the instrument upon its deposit; now it does not gain title but obtains the instrument as an agent for the purpose of collection. When the proceeds have been collected by the bank and credited to the account of the depositor, then, and then only, do the proceeds become part of the general funds of the bank."

The evidence is uncontradicted that the proceeds had been collected by the defendant and credited to the account of Salzenstein before the amount of the deposit was applied on Salzenstein's indebtedness. Numerous cases have been cited by counsel for plaintiff where the bank had knowledge of the fact that the funds deposited in the account were not the funds of the party depositing them, or had knowledge of facts which might well lead them to believe that the funds were not the funds of the depositor, that it could not apply such funds to the indebtedness of the depositor to the bank. It appears to us that these cases are not in point because as heretofore pointed out there was nothing in this transaction which would lead the bank to believe that the various items deposited on May 17, 1933, were the property of any one other than the depositor, Salzenstein & Company. Certainly there was nothing that would lead the bank to believe that the

\$2,100 check of the plaintiff was to be used by the bank to purchase a draft to buy 300 shares of brewing company stock at \$7 a share.

There being no evidence to sustain the allegations of the plaintiff's declaration the trial court properly directed a verdict at the close of plaintiff's evidence, and entered judgment for defendant, and the judgment of the trial court is, therefore, affirmed.

Judgment affirmed.

(Eight pages in original opinion)

Abstract.

Opinion Filed - January 12, 1935

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PUBLISHED IN ABSTRACT

**A. F. Turnbeaugh, Agent for the Shareholders of the
First National Bank of Nebo, Illinois, Plaintiff-
Appellee, v. L. T. Graham, et al, Defendants-
Appellants.**

Appeal from the Circuit Court of Pike County

278 I.A. 636³

OCTOBER TERM, A. D. 1934

Gen. No. 8841

Agenda No. 8

MR. JUSTICE DAVIS delivered the opinion of the Court.

This suit was originally instituted by a bill filed in the Pike County Circuit Court by the First National Bank of Nebo against the Minier State Bank of Nebo and certain stockholders of said bank.

The Minier State Bank of Nebo, Illinois, some six years prior to the filing of the original bill herein decided to cease the active conduct of its business and to liquidate, provided the First National Bank of Nebo would assume debts due depositors of said Minier State Bank, and as security for having assumed said debts the Minier State Bank endorsed and transferred to the First National Bank of Nebo certain notes aggregating the sum of \$15,000.00.

By the bill it was sought to establish the liability of the Minier State Bank and certain of its stockholders on account of five of said notes, which at the time of the filing of the bill had become in default. Appellant was not a party to the original bill.

During the pendency of this suit the First National Bank of Nebo closed its doors and Frank W. McRoberts was appointed receiver, and he was succeeded by Nelson H. Greene; and on motion of appellee, made in this court, A. F. Turnbaugh, agent for the shareholders of the First National Bank of Nebo, was substituted in place of Nelson H. Greene, receiver.

Upon the trial of said cause a judgment was rendered against the Minier State Bank and its stockholders on account of the notes held by the First National Bank then in default and for which the Minier State Bank was liable as endorser.

The original bill of complaint avers that there was a large number of other notes besides the five notes, which had also been endorsed by said Minier State

Bank to the First National Bank and which were not at the time of the filing of the original bill dishonored, but that these other notes would at the time of their maturity be dishonored, and that the cause as stated by the original bill should be retained on the docket or stricken with leave to reinstate for further proceedings when the other notes became dishonored.

The original bill also contained a prayer that the cause be retained or that leave be given to reinstate the same upon the dishonoring of the other notes, and in the decree rendered it was ordered that the cause remain upon the docket of this court for further proceedings, if any shall become necessary with respect to any other notes and endorsements of the Minier State Bank of Nebo, maturing and becoming due after the commencement of this suit; such further proceedings to be instituted by a supplemental bill, or otherwise, according to the practice, and praying for summons or publication according to the statute, and that if such further proceedings shall become necessary notice by summons or otherwise, according to the practice in chancery, shall be given to the defendants interested for the time required by law for the service of such summons under original bills.

On May 31, 1932, Frank W. McRoberts, receiver for the First National Bank of Nebo, filed a supplemental bill against the Minier State Bank and its stockholders, including the appellant, L. T. Graham, and others. The supplemental bill set out the proceedings had and taken in the original bill and sought an additional decree against the Minier State Bank and its stockholders on account of the newly defaulted notes in the amount of \$18,000.00. It contained averments that the legal principles and the questions involved under the original bill of complaint were binding upon the defendants in the supplemental bill who were also defendants in the original bill, and averred that those persons who had been defendants to both the original and supplemental bills were estopped to deny decretal orders made upon the original bill as far as they were applicable to the facts and the law involved in the supplemental proceedings.

The prayer for relief in the supplemental bill, among other things, was that the defendants, including L. T. Graham, be required severally to answer the averments of the supplemental bill and so far as necessary or appropriate the averments of the original bill.

All the defendant excepting said L. T. Graham and G. A. Minier, executor, were defaulted and a decree was entered against them on the 20th day of June, 1933. G. A. Minier, executor, filed a plea to the bill which was sustained, and the bill was dismissed as to him. L. T. Graham filed a general demurrer to the supplemental bill and a special demurrer averring that he was not a defendant to the original bill, but he filed no pleading to the original bill. On a hearing the demurrer was overruled, and appellant elected to abide by his demurrer. And thereupon the court ordered the supplemental bill of complainant to be taken as confessed against appellant and a decree was entered against him in the sum of \$2000.00 as the owner of twenty shares of stock in the Minier State Bank. In the decree it was provided that the judgment entered against appellant should be taken and considered together with a decree of June 20, 1933, to the end that the total amount collected from all the stockholders on account of liability arising from the notes set up in the supplemental bill should not exceed the total amount of \$18,354.47.

This appeal was prosecuted by appellant for a reversal of that judgment and the errors relied upon are: that the demurrer should have been sustained and that the judgment should not have been entered against him.

The original bill was filed in this case to obtain a judgment against the Minier State Bank and certain stockholders upon notes which were endorsed and delivered by the Minier State Bank to the First National Bank of Nebo, and upon which the makers had defaulted. After default was made by the makers of such other notes referred to in the original bill, the supplemental bill was filed and appellant and others were made parties defendant to the proceeding.

Appellant says he was not a party to the original bill and that it contemplated that not only the notes complained of in the bill were in default but that there were a great many other notes representing a large sum of money which would be defaulted, and the theory of the bill was to secure a judgment not only on the notes then in default but a holding on which it could hold the defendants against whom judgment might be had as to the five notes then in default and as to other notes when they should be in default. The supplemental bill adopts this theory, and no doubt as to the defendants to the original bill they are estopped in making a defense as to the other notes. If the theory



of the trial court be correct then in this instance a party who had no opportunity to defend in the original bill is estopped and prevented from making a defense; that the appellant not being a party to the original bill can not be bound by the original decree, not having had an opportunity to litigate the original bill. On this theory a judgment was had on the whole bill, which included the original bill to which appellant is not a party and the supplemental bill to which he is a party. That not being a party to the original bill he cannot be made a party to the supplemental bill which is merely an adoption of the original bill, with the further allegation that as to the notes referred to in the original bill and not then in default are now in default.

A supplemental bill, being in effect but an amendment, by which new matter which has transpired since the filing of the original bill is brought into the case, forms a part of, and is tried with the original case. *Mix v. Beach, et al*, 46 Ill. 311. It is a mere continuation of the original suit and whatever evidence was properly in the original suit may be made use of in both suits, even though not entitled in the supplemental suit. Puterbaugh's Chancery Pld. and Prac., 7th ed., sec. 296; Daniel's Chy. Pld. and Prac., 3rd Am. ed., p. 1611.

It is permissible after decree rendered on an original bill to file a supplemental bill when the matters relied upon as supplemental have arisen since the commencement of the original suit and to bring new parties before the court. Puterbaugh's Chancery Pld. and Prac., 7th ed., sec. 286.

If a decree has been obtained before the event by which the supplemental bill was rendered necessary there must be a decree on the supplemental bill for which purpose the supplemental cause must be set down for a hearing alone, or it may be heard with the original cause for further directions. Daniel's Chancery Pld. and Prac., 3rd Am. ed., p. 1612; Puterbaugh's Pld. and Prac., 7th ed., sec. 297; Fletcher's Equity Pld. and Prac., sec. 844.

In the case of *French v. Commercial National Bank*, 199 Ill. 213, a bill was filed to set aside fraudulent judgments; a decree was entered in favor of the Commercial National Bank, and the claims of other interested creditors; an appeal was taken and judgment was reversed by the Appellate court. After the judgment had been reversed and the cause remanded the Commercial National Bank filed an amended and supplemental bill; and upon a hearing the court found specially in favor of the material allegations of the

bill and the amended and supplemental bill. In answer to an objection that it was error to allow the supplemental bill to be filed, the court said: "The original and supplemental bills both proceeded upon the same general ground of fraudulent conspiracy upon the part of the defendants to the bill, including the appellant."

In *Eager, et al. v. Price, et al.*, 2 Paige Chancery, 331, the complainants being judgment creditors of the defendant, Price, filed their bill in equity to obtain satisfaction of their debt out of his equitable property, but he demurred to the bill which was overruled and from which demurrer he appealed to the chancellor. The complainants afterwards prepared a supplemental bill setting forth those proceedings and showing, among other things, that since the filing of the original bill Price had become the owner of 250 shares of stock in the Harlem Canal Company, the par value of which was \$50.00 a share, and had also received upwards of \$2000.00 in money from another source, and making Price and others defendants.

The bill prayed for an injunction and on hearing before the court an injunction was denied, and from that decision the complainants appealed to the chancellor. It was said by the chancellor, in his opinion: "As it appears from the supplemental bill that the stock in question was acquired since the commencement of the suit; if the demurrer to the original bill was properly overruled by the vice-chancellor, it seems to follow that this bill is necessary and proper, that the injunction should have been granted as prayed for therein; if the original bill was defective in substance, so that no decree thereon could have been made at the hearing, the supplemental bill must necessarily fall with it, as the latter is but a continuation of the same suit; but if the complainants were right in filing the original bill, a supplemental bill seems to be the proper mode of reaching subsequently acquired property of the defendant. Although in relation to its immediate object, and against the Harlem Canal Company, it may in some respects be in the nature of an original bill, notwithstanding it is supplemental as to the former proceedings.

This species of bill is recognized by Lord Redesdale as a proper mode of bringing newly acquired interests of the parties, but relating to the same subject, before the court. (Mitf. Plead., Amer. ed., 49, 50; 4 Lond. ed., 63.)

The court then held that, in order to protect his rights as to such subsequently acquired property, it

became necessary for the complainant either to file a supplemental bill to reach this stock and protect it by injunction, or to commence a new suit for that purpose, and then said: The expense of a supplemental bill is but trifling, when compared with that of an original suit. And this court certainly would not, except in a case of absolute necessity and to prevent a failure of justice, allow two original suits to be commenced, and carried on at the same time, between the same parties, to obtain a satisfaction of the same debt. I think, therefore, this was a proper case for a supplemental bill, and that the injunction should have been granted as prayed for therein.

From the foregoing authorities it will be seen that a supplemental bill is in effect but an amendment by which new matter which has transpired since the filing of the original bill is brought into the case and forms a part of and is tried with the original case, and that, even after decree is rendered on an original bill, a supplemental bill may be filed setting up new matter that has transpired since the filing of the original bill and bringing new parties before the court, and that the supplemental bill may be heard with the original cause for further directions.

When he was served with summons issued in accordance with the prayer of the supplemental bill, he became a party to said proceedings and it became his duty to not only answer the supplemental bill but to also answer the original bill in accordance with the prayer of the supplemental bill. Not having answered the original bill and after his demurrer to the supplemental bill was overruled, having elected to abide by his demurrer, a decree pro confesso was taken against him, and he was not estopped from making a defense as to the original and supplemental bills from any finding or decree entered in the original suit.

The court by its original decree retained jurisdiction of said cause for the purpose of further proceedings with respect to any other notes and endorsements of the Minier State Bank maturing or becoming due after the commencement of the suit and authorized the filing of a supplemental bill. The matters contained in the supplemental bill all grew out of the same transaction and were related to and connected with the grounds of relief relied upon in the original bill, and appellant was in no way prejudiced as the same defenses could be interposed that might be interposed had complainant caused an original suit to be instituted against him.

As was said in *Eager v. Price, supra*, the *supplemental* bill in relation to its immediate object, and against appellant may in some respects be in the nature of an original bill, notwithstanding it is supplemental as to the former proceedings, yet this species of bill is recognized as a proper mode of bringing newly acquired interests of the parties, but relating to the same subject, before the court.

We are of opinion that the demurrer of the defendant, L. T. Graham, to the supplemental bill was properly overruled and that the Circuit Court committed no error in entering judgment by default against him and that the decree should be affirmed.

Affirmed.

(Eight pages in original opinion)

PUBLISHED IN ABSTRACT

Barney Fromm, Appellee, v. Guy Smock, Appellant

Appeal from the Circuit Court of Vermilion County

OCTOBER TERM, A. D. 1934.

278 I.A. 636

Gen. No. 8853

Agenda No. 17

MR. JUSTICE DAVIS delivered the opinion of the Court. Appellee, Barney Fromm, plaintiff in the circuit court, on July 11, 1931, was driving an automobile truck west on State Route No. 9, which runs due east and west across Vermilion county, and in the car with him was one Henry Grubb. They had been painting a billboard for the Standard Oil Company about five miles southeast of Hoopeston. They had finished their work and were going back to Hoopeston in a westerly direction for dinner. As they were approaching the crossing of the Chicago, Minneapolis and St. Paul Railway Company they observed two cars coming from the west which were quite a distance apart. This is a double track railroad, running north and south at the point where Route 9 crosses it. The highway at this point was level from the railroad east for about a quarter of a mile, and for a mile or so west of the railroad, and the grade of the highway and the railroad were the same.

At the west property line of the railroad the concrete ended and tarvia pavement extended east for about thirty feet, and from the west rail east the crossing was planked and the concrete on the east side of the railroad came within two feet of the east rail. The concrete pavement was sixteen feet in width and had a mark showing the middle of the pavement. Appellee was traveling upon the right side of this mark and was going about thirty miles an hour, and about 200 feet before reaching the crossing had decreased the speed of his car to about fifteen or twenty miles an hour. One of the automobiles which was approaching from the west was a truck and the other was a touring car made over into something like a light delivery wagon. When appellee first saw these cars they were quite a ways west of where he was and west of the railroad crossing. As they approached the crossing they were coming closer together. When appellee



was about fifty or sixty feet east of the railroad tracks the front car passed him. As he reached the east track of the railroad the other car was approaching him and it swerved towards him, and a collision occurred between the two cars about the east track of the railroad. Appellant testified that when he was within a few feet of the west rail of the west track he saw this paint truck coming and it was right up by the rail when he last saw it, and at that time he saw another car which got in between him and the paint truck but that he did not know where this other car was when the collision occurred.

Appellee was seriously injured and he commenced this action in the circuit court of Vermillion county to recover damages for the injuries sustained.

The declaration consists of one original and five additional counts. In the original count appellee charges: That on the 11th day of July, A. D. 1931, the plaintiff was driving his automobile in a westerly direction on State Highway Route Number Nine, towards the intersection of said highway with the railroad tracks of the Chicago, Minneapolis and St. Paul Railroad, at a point about five miles southeast of the city of Hoopeston, Illinois, and that the defendant was driving another automobile in an easterly direction along and upon said highway toward said intersection and that the defendant so carelessly, negligently and improperly operated, managed, controlled and drove said automobile in which he was riding that by reason thereof he did then and there run into and collide with great force and violence against said automobile so driven by the plaintiff, he the plaintiff being in the exercise of due care and caution for his own safety, and by means of such force and violence and as a consequence of said collision he was greatly injured, etc.

The first additional count of the declaration charges that the defendant so carelessly, negligently and improperly managed, drove, operated and controlled said motor vehicle then in his control and possession that by reason thereof said motor vehicle suddenly did turn to the left and upon the northerly half and side of the traveled part of said public highway, whereby said motor vehicle operated by the defendant was then and there brought into violent collision with said truck operated by the plaintiff and the plaintiff was injured, etc.

The second additional count charges that the defendant, in violation of the Statute law of the State of Illi-

nois, called the "Motor Vehicle Law," then and there carelessly, negligently and improperly drove and propelled said certain "cattle truck," a motor vehicle of the Second Division, upon and along said paved highway in an easterly direction, at the high and dangerous rate of speed of fifty-five miles per hour, and at more than thirty-five miles per hour, a speed greater than was reasonable and safe having regard to the traffic and use of the way and such as to endanger the life and limb and injure the property of other persons, and that in consequence thereof said motor vehicle suddenly became unmanageable and beyond and out of the control of the defendant and then and there suddenly slid, skidded and turned from the southerly half of the paved part of said highway in a northerly and north-easterly direction across the center of said highway, whereby said motor vehicle operated by defendant was brought into violent collision and contact with said truck so driven by plaintiff and by means whereof the plaintiff was injured.

The third additional count charges defendant was driving a certain motor vehicle, designated a cattle truck, along said highway at a high and dangerous rate of speed, to-wit, fifty miles per hour, upon which was placed a certain apparatus called rack and crate upon the bed of said truck which was nine feet wide, six feet high and twelve feet long; that said motor vehicle of defendant was then and there and for ten days theretofore had been in an unsafe, insecure and dangerous condition to be operated at said rate of speed in this, that, because of said rack or crate so attached to the same, at such rate of speed, said motor vehicle would likely, suddenly "shimmy", sway and become unmanageable and out of control of the driver thereof, and likely to collide with a vehicle passing the same, and that it became and was the duty of defendant in so driving his motor vehicle upon said public highway, toward and up to the plaintiff, to exercise reasonable care and caution to propel the same at a rate of speed whereby the same would not become suddenly unmanageable and out of control, and that in violation of his duty in that behalf he negligently and carelessly propelled and drove said motor vehicle at the high and dangerous rate of fifty miles per hour and in consequence of such unsafe and dangerous condition of said motor vehicle, the same while being driven at said high and dangerous rate of speed, suddenly began to "shimmy", sway and did suddenly become unmanageable and out of control, and in con-

sequence thereof did suddenly lurch, skid and turn from and off the southerly half of the paved part of said highway across the center and to and upon the northerly half thereof whereby his motor vehicle was then and there brought into violent collision and contact with the motor vehicle of plaintiff and by means whereof the plaintiff was injured.

The fourth additional count charges that under the Statute law of this State every motor vehicle, while in use on a public highway, should be provided with good and sufficient brakes, and that the motor vehicle being propelled by defendant was not then and there provided and equipped with good and sufficient brakes but that the brakes with which it was equipped were worn, broken, loose, out of adjustment and alignment, and the various parts thereof unequally adjusted and aligned, whereby said motor vehicle was likely to suddenly turn to the left should the operator thereof suddenly apply the brakes, and avers that the defendant in violation of his duty negligently drove said motor vehicle at the rate of fifty miles per hour toward said railroad crossing and within twenty feet of the front of plaintiff's truck and then and there suddenly applied the said brakes of his motor vehicle and in consequence it suddenly turned to the northeast and north and was brought into violent collision with the motor vehicle of plaintiff and in consequence thereof the plaintiff was injured.

The fifth count charges that under the Statute of the State of Illinois every person operating or driving a motor vehicle on State Highways on which was constructed paved roads having two traffic lanes should, whenever practicable, keep to the right of the center line of the paved portion thereof, and should have the right of way on that traffic lane, and charges that in violation of said duty the defendant carelessly and negligently drove and permitted said truck to be and travel in a northeasterly direction over and across the center line of said highway for a great distance, to-wit, fifty feet, and drove said truck in front of plaintiff so proceeding westerly in said northerly traffic lane, whereby the motor vehicle driven by defendant was suddenly brought into violent collision with the motor vehicle of plaintiff and by means whereof the plaintiff was injured.

On the trial of said cause the jury returned a verdict in favor of appellee for \$6500.00. A motion for a new trial was made and overruled and judgment was entered on the verdict, from which this appeal was perfected.

The errors relied upon for reversal of the judgment as shown by the statement of appellant in his brief are, as follows: 1. The verdict of the jury was contrary to and against the evidence; 2. The court erred in refusing to exclude improper evidence offered by the plaintiff; 3. The court erred in refusing to give certain proper instructions offered by plaintiff; 4. The verdict of the jury was excessive; 5. The verdict of the jury was based upon passion, prejudice and sympathy; 6. Counsel for plaintiff asked certain questions that had been ruled improper by the trial court, and persisted in again asking said questions in the presence of the jury; 7. Counsel for plaintiff made improper remarks in the presence of the jury, which were prejudicial and considered largely to the verdict in the case; and, lastly, that the court erred in not granting a new trial because of newly discovered evidence on the part of defendant.

Appellee testified that he and Henry Grubb were working east of the place where the accident happened, and that they had finished their work and were figuring on going to Hoopston for dinner; that back about a quarter of a mile east on the highway he was traveling on the right side of the concrete and continued on down towards the railroad crossing; that the concrete pavement had two traffic lanes, and as he approached the crossing he was traveling about thirty miles an hour, and back about 200 feet from the crossing he decreased his speed to about fifteen to twenty miles an hour; that he observed two automobiles coming from the west, one was a truck and the other was a made-over car, looked like a Ford or Chevrolet; but when he first saw them they were quite a ways west of him and west of the railroad crossing; that he did not know which car was in front when he first saw them, that they were quite a ways apart, probably a quarter of a mile or more, and as they approached him they were coming closer together, and when he was east of the railroad track, probably about sixty feet, the front car passed him; from the time he first saw it until it passed him it was on the south side of the pavement, and at that time another truck was coming towards him, and seemed to come in his direction, and that was the last he remembered; when the first car passed him the other car followed closely behind; it was on the south side of the pavement, and it was coming towards the railroad crossing from the west; that the car was on the south side of the pavement and coming towards him at an angle headed

northeast; that he was driving in a Chevrolet ton and a half truck, and that with the load that was in it, at the time, it would weigh about two and a half tons; the condition of the highway where it crosses the railroad was level, and the road was perfectly straight for a mile or two, so far as he could tell; that the speed of the other car at the time he saw it swerve towards the east was around forty miles per hour; when it swerved to the northeast it crashed into him, and that is all he could remember; when he saw the car coming there was a culvert where he was and he couldn't get off the pavement, that there was no place for him to get out of the way; it was coming towards him just as he started to hit the tracks; that there was a collision of the two trucks, and that his truck was on the north side of the road right about the east track; that it was several days after that before he knew much.

Henry Grubb who was riding with appellee testified that he was riding on his right and that there was just one seat in the truck and that appellee was driving; that it was about 11:30 o'clock, and the weather was fair; we drove up as far as the railroad track when the wreck occurred; for the last quarter of a mile, up to and on the track we were on the north half of the pavement, and did not at any time during that distance get over the center line of the pavement; during the time that we travelled that last quarter of a mile I looked towards the west side of the railroad on the highway and saw two cars west of the railroad; I don't remember the make of them, but they were coming in our direction; they were on the south side of the pavement, and when I first saw them they were about a city block apart and about a quarter of a mile west of the railroad; as we approached, we practically met at the railroad; the car in front passed us, and as we met at the railroad the other car swerved into us; the first car passed us about fifty feet east of the track and the other car was about fifty feet west of the right of way line of the railroad at that time; I saw the first car before it got across the railroad; when the first car was at the west railroad right of way the second car was about 100 feet west of it; neither of these cars passed around the other while I was looking, and there were no other vehicles there at that time; in my judgment the second car was traveling at between 40 and 45 miles per hour; the first car as it approached the railroad right of way seemed not to be going as fast; after we passed the first car we continued going on west;

I know the place on the north side of the highway where a man, named Brocker, used to live and with reference to that house and the east track of the railroad we were passed by the car which went east about fifty feet east of the railroad; the accident occurred on the railroad right of way about the east track, and when we got to the railroad this other truck all of a sudden swerved towards us and pushed us over into the ditch; when we were hit we were on the north side of the slab about where the tracks were; I can remember when the truck hit us, it throwed me around inside and my head hit the ceiling and knocked me out, and I couldn't say how long before I came to; when I came to I saw Mr. Fromm was laid out under a tree at the corner of Mr. Brocker's house; I went up to him, and then I began to remember something that had happened, and I called his residence; then we waited for a doctor, and Mr. Fromm laid there until the ambulance came; during the last quarter of a mile before we got to the track we were going about 30 or 35 miles per hour; from Mr. Brocker's house on to the right of way of the railroad we slowed down to about 20, and when we got up to the tracks we were traveling about the same speed, and during all of that time we staid on the north side of the pavement.

Frank W. Reyher testified on behalf of plaintiff, that I know the location of the intersection of the Illinois State Route No. 9 and the Chicago, Milwaukee & St. Paul Railroad and made certain measurements at that crossing and made a memorandum of them; the pavement is 16 feet in width, and it is the same width east and west of the railroad; there were marks down the center of the pavement east and west of the railroad; there was a tarvia surface which extended westward about 30 feet from the west rail of the railroad track, but there was no tarvia on the east of the railroad; from the east rail to the edge of the slab was wood, about a foot in width; there was a culvert east of the rail and north of the slab, and there was a cap which was six inches high above the shoulder and nine inches thick; I didn't observe any culvert on the south side.

O. E. Young, a witness on behalf of appellee, testified, I knew this highway and crossing and lived eighty rods west of it; on the 11th of July, 1931, I was up to the crossing and saw Mr. Fromm, the plaintiff, and Mr. Smock, the defendant; I had known Mr. Smock for about ten years; Mr. Butsaw arrived about the time I did, also Mort Brocker; Mr. Brocker is now dead; when I got there Mr. Fromm was lying under a tree

in the corner of Mr. Brocker's yard; his house is the first house east of the crossing, on the north side; I saw the trucks and, as I remember it, the paint truck was headed to the northwest and was entirely off of the slab with the exception of the right hind wheel, and was toppled over onto its right side; I know where the little stone culvert is on the east side, and the paint truck was lying pretty close to that culvert, I should judge about five feet north of the slab; the other truck was at the side of the paint truck, it wasn't turned over, it was headed northwest, and as I remember it it was all on the north side of the center of the black line, with the exception of the left rear wheel; I was standing out in the yard at the time and happened to be looking east and saw the two cars, and it looked to me as if they had come together; I did not hear the crash; I went up there; the left hand side of the paint truck was pretty badly jammed up; I could not say whether either of the cars had been moved when I came up; I came from the west up to the railroad, and when I got there I parked on the south side of the slab and got out of my car and walked up and went over to the east side of the track and saw Frank Butsaw coming from the east about the same time I came from the west; I did not see any cars beside the two referred to; and there was no obstruction from where I was to that place; I saw the cattle truck there, and it had pneumatic tires. I saw tracks there in the asphalt pavement on the west side of the tracks, and just after those tracks hit that asphalt pavement they swayed to the northeast, I should judge on an angle of about 45 degrees; I first noticed the tracks a little west of this asphalt; they were going just a little northeast, there was a change in the direction, the further east they came the more northeast the tracks ran; I did not see but two automobile tracks; they were perfectly plain in the asphalt; I do not know how wide the tracks were, but presume in the neighborhood of five inches; these tracks ended about the west rail of the east railroad tracks; they ended right near the rear wheel of the cattle truck, and they went across the center line of the pavement.

Frank Butsaw testified on behalf of appellee, I am a farmer and am acquainted with Mr. Fromm but did not know him before the accident occurred; I have known Mr. Smock five or six years; I was at home when the accident occurred, I live between a quarter and a half mile east of the railroad crossing; I was out in the barn lot, but did not hear anything; some

one called out that there was an accident, and I got into a machine and drove down; as I was going down there I could see down the highway; I know Mr. Young who just testified, and saw him there and saw the trucks standing there and they were on the north side of the right of way of the pavement; one truck had left the hard road, and the other one was partly setting on it; it was Mr. Fromm's truck that had left the hardroad, and it was turned over on its side and headed northwest; the other truck was a cattle truck, and it was turned at an angle to the northwest and was north of the center line of the highway; the rear ends of the two trucks were about parallel with each other; I observed marks around there right west of the west rail; there is about 25 or 30 feet of asphalt and you could see the impression of the tires very plainly, the impression began right at the west edge of the asphalt; west of that was cement; they came straight on the asphalt about 10 feet and then turned north; from there they went at an angle to the northeast and ended about 4 feet north of the center of the pavement; they were marks from the tread of the tires, about four or five inches in width and plainly visible; the paint truck was jammed in on the left side and the motor driven back into it and the left door was wrecked.

Harry Clement testified on behalf of appellant, I live at Hoopeston and was at the scene of the accident shortly after it occurred; I saw Smock's truck sitting there, and the front wheels were four or five feet on the north side of the pavement and the back wheels were on the south side of the black line, especially the right back wheel; I saw some marks on the asphalt approach to the west track; they were black marks made by the tires, and they turned northeast about three foot of the boards west on the wooden approach on the west side of the track; these tracks were on the south side of the black line before they began to turn; and the north track, I judge, was a foot and a half south of the center line before it began to turn; the paint truck was headed practically parallel to the east rail and the rear was lying on the wooden approach; Smock's truck stood on the wooden approach, and was damaged in the left front part; the wheel and fender were smashed; it seems to me like the paint truck was all smashed in.

Nettie Sites testified that she lived two miles northeast of Rankin, and that she was a graduate nurse and was in attendance upon the plaintiff, and thinks she went on duty in September; and that very little was

said about the accident by him (meaning appellee); he did tell me he did not know how it happened, he thought there was a third truck involved, but she did not know whether he remembered anything for about two months.

Geraldine Smock testified that she lives in Rossville and was a daughter of the appellant and knew Mr. Fromm and saw him at Lake View hospital, and that her sister was with her and talked with him; he told me he did not have any knowledge about how the accident happened, that he did not blame my father; this was in August after the accident, and he talked as if he was in his right mind; I went there for the purpose of finding out what he knew about the accident; I learned yesterday that his memory was blank for a month, I was in there probably for about five minutes.

Bernice Smock-Harris testified that she was a daughter of appellant and lived at East Lynn, and was with her sister at Lake View hospital when we went up to see Mr. Fromm; that Mr. Fromm told us that he did not blame my father; he said he did not know how it all happened, it happened so quickly.

Guy Smock, appellant, testified, I am fifty years old and lived on a farm for 20 years; I was driving a truck at the time of the accident, which happened about 11:00 o'clock, was going east on the Bloomington highway; the crossing is level and there is about a 30 foot break in the cement on the west side of the tracks which was filled with asphalt; as I approached the crossing I was alone in my car, and I have an idea I saw this paint truck coming from the east quite a ways, I should judge a quarter of a mile, and I drove around 30 to 35 miles an hour when I first saw the truck coming; I suppose I slacked up for the railroad—most generally do, and as I approached the asphalt filler was going about 30 miles an hour; before I got to the asphalt filler and before I met the other truck there was a vehicle pulled on my left side from the north and came in ahead of me; there wasn't any car immediately ahead of me, going the same direction, before I got to the asphalt filler; I was right up to the asphalt when this car came from behind; I was on the south side of the black or center line; the other car was between me and the paint truck right before the accident just before the paint truck and my car collided, I don't know what happened to this third car; before this other truck got in between me and the paint truck the paint truck was on the north side; I did not see it on the south side; just as

the two cars came together I was on the south side and the paint truck was on the north side; my car was headed east when the two cars collided, and the paint truck was going west; they collided just over the west rail; I don't think there was much room between me and the paint truck when the other car turned in between because after he hit me I did not know yet I hit the paint truck; I was rendered unconscious, and was not able to remember the location of the truck after the accident until I went back there; immediately after the accident I was taken to a doctor's office in Hoopeston; when I was a distance of 50 feet west of the railroad crossing I was not driving at a rate of speed greater than 40 or 45 miles an hour; I did not see the car that went around me before it went around, and don't suppose I looked back to see if any car was following me since I left the Dixie highway; the tar pavement is something like 30 feet wide until it gets to the planking; I never noticed where the tar began; I saw marks afterwards that my car made, could not tell which wheels of my car made the marks, and remember the marks were plain in the tar; they went east a little and veered off to the left or northeast and got on the boards, and I noticed that the tar was carried onto the boards; the cars came together on the east two rails; was traveling 30 to 35 miles an hour when I reached the left side of this tar; I don't remember saying I was driving pretty fast, about 15 or 20 minutes after this crash, in the presence of Mr. Young and Frank Butsaw and Mr. Brocker; when the other car went around me I was right there on the asphalt; he went around me right on the two west tracks, and I was on the side road; I went back and saw my track—what they told me was my track; they ran right up to where my truck was, and don't know how far back the track started on the cement west of the asphalt; it might have been three or four feet on the cement; I remember putting my brakes on.

Appellee, upon being recalled, testified that he said to Nettie Sites that I did not blame her father. In the first part of September I told her I did not know just how the accident happened and did not at that time know; Mr. Smock talked to me in the hospital, and I told him I did not know how it happened; I further told him I knew there was a third car but did not know how or what it had to do with the accident.

A careful consideration of the evidence leads us to believe that the verdict of the jury is not contrary to the manifest weight of the evidence. It is claimed



that there was another car besides the truck of appellant approaching from the west and that it passed his truck, but from the evidence the jury were warranted in believing that no car passed the truck of appellant after it was any where near the crossing. At the time the car in front passed appellee's car it was fifty or sixty feet east of the crossing and the truck of appellant was west of the crossing at that time. The truck of appellee was at all times on the right hand side of the center line of the highway and just before the collision the truck of appellant swerved over to the left and was headed in a northeasterly direction, as appears from the uncontradicted testimony in the case as to the marks made by the tires in the tarvia after appellant applied his brakes, as he says he did; and it is fair to presume that the cause was the checking of the speed of the truck by the application of the brakes. So far as appears from the evidence appellee was guilty of no contributory negligence.

One of the errors relied upon for a reversal of the judgment as stated by appellant in his brief is that the court refused to exclude improper evidence offered by appellee and also that the verdict of the jury was based upon passion, prejudice and sympathy, yet such evidence which is claimed to have been improperly excluded is not pointed out by appellant in his brief and argument, neither was it mentioned that the verdict was based upon passion, prejudice and sympathy, and it is evident that appellant did not wish to press these grounds for a reversal of the judgment. Appellee was confined in the hospital for a long time, and part of the time not fully conscious, and was severely injured and the verdict of the jury is not excessive, and from anything that appears in the evidence we fail to discover that the verdict was based upon either passion, prejudice or sympathy and we find that the jury were justified in finding for the plaintiff.

It is true that counsel for plaintiff persisted in asking certain questions after the court had ruled such questions improper. Such conduct in an attorney cannot be too severely condemned. However, in view of the evidence we do not feel justified in remanding the case on account of such misconduct on the part of counsel for appellee.

It is also urged that the court erred in not granting appellant a new trial because of newly discovered evidence on the part of the defendant. The court did not err in overruling said motion. Applications for a new trial on the ground of newly discovered evidence are

not looked upon with favor and are subjected to close scrutiny. The burden is on the applicant to rebut the presumption that the verdict is correct and to show that there has been no lack of diligence. "The evidence must fulfil the following requirements: First, it must appear to be of such conclusive character that it will probably change the result if a new trial is granted; second, it must have been discovered since the trial; third, it must be such as could not have been discovered before the trial by the exercise of due diligence; fourth, it must be material to the issue; and fifth, it must not be merely cumulative to the evidence offered on the trial." *People v. Dabney*, 315 Ill. 320; *People v. Johnson*, 298 Ill. 53. The newly discovered evidence must be positive and conclusive and capable of definitely settling the controversy. *King v. Swanson*, 216 Ill. App. 294.

This newly discovered evidence is merely cumulative and not conclusive. Lewis states in his affidavit that he was walking south on the railroad and when he was within 200 yards of where State Highway No. 9 crosses the tracks he saw an automobile accident; that he saw a small car pass a stock truck on the left hand side and apparently strike the left front wheel or the front end of the truck causing him to lose control of the car. The only positive statement made by Lewis was that he saw an automobile accident and saw a small car pass the stock truck on the left hand side, the balance of his statement being mere conclusions of the affiant.

The rule has been followed in this state not to reverse on the grounds of newly discovered evidence unless diligence has been shown by both the attorney and client with reference to presenting the matter at the time of the first trial. *People v. Blanch*, 309 Ill. 426.

Furthermore, according to the statement of Lewis he was present at the place of the accident and saw a number of persons and later learned that the truck was driven by Guy Smock of Rossville, Illinois. The evidence must have been discovered since the trial, and when it consists of evidence of a person who was present at the time the accident or controversy occurred, it must be shown that such fact could not have been ascertained by reasonable inquiry and the exercise of due diligence. *Graham v. Hagmann*, 270 Ill. 252. The only showing made that the fact that Lewis was present at the scene of the accident could not have been ascertained by the exercise of reasonable diligence was by affidavit filed in support of the motion for a new trial

on the ground of newly discovered evidence by Melvin E. Harwood who says under oath that he is the agent of Guy Smock, but no showing is made by the defendant or his attorneys and no showing is made by appellant that Harwood was authorized by him to make investigation as to who was present at such accident and ascertain what such person knew about it. Lewis was in the State of Kentucky at the time of the making of the affidavit, and no assurance was given that he would be present at another trial except the belief of the attorneys for appellant.

Appellant insists that the court erred in refusing to give to the jury the second instruction requested by him which reads as follows: "The court instructs the jury that by his declaration in this case the plaintiff charges that the defendant was negligent in the operation of his truck in that it suddenly did turn to the left and upon the northerly half and side of the traveled portion of the public highway and into collision with the truck operated by the plaintiff.

In order to recover in this case it is incumbent upon the plaintiff to prove the said charge by a preponderance of the evidence in this case and if you find that he has failed to so prove the said charge in his declaration then your verdict should be for the defendant."

Counsel for appellant contends that every count in plaintiff's declaration charges that the defendant turned his truck to the right and caused the injury to the plaintiff, through carelessness and negligence of the defendant, and that it is necessary for the plaintiff to prove the specific acts of negligence alleged, before he can recover, and that it is not sufficient for him to prove some other act of negligence than that averred in his declaration.

While it is true that the plaintiff must prove the acts of negligence charged in his declaration before he can recover, yet he is not confined to one allegation of negligence and may allege as many different acts of negligence in the different counts of his declaration as he thinks the evidence warrants, and it is not necessary in order that the plaintiff recover that he prove all of the allegations of negligence but may recover if he proves one or more of the negligent acts alleged.

The original count of the declaration alleged that the defendant so carelessly, negligently and improperly operated, managed, controlled and drove his said motor vehicle that by reason thereof he ran into and collided with the motor vehicle driven by the plaintiff.

The first additional count alleged that the defendant so carelessly, negligently and improperly managed, drove and controlled said motor vehicle, that by reason of such negligent control, it turned to the left and upon the northerly half and side of the traveled portion of said public highway. The negligence charged in this count is the manner in which the defendant managed, drove, operated and controlled the motor vehicle, and not that it was turned to the left, the turning to the left being the result of the careless operation of the truck.

The second additional count alleges that the defendant drove his cattle truck, a motor vehicle of the second class, at more than thirty-five miles per hour, contrary to the Statute, and that in consequence thereof the truck suddenly became unmanageable and beyond the control of the defendant, and then and there suddenly slid, skidded and turned from the southerly half of the pavement in a northerly and northeasterly direction across the center of said highway. The negligence charged in this count is the driving of the car at a high and dangerous rate of speed in violation of the statute.

Likewise the third and fourth counts charge negligent acts other than the turning of the truck to the left, and only in the fifth additional count is it charged that the statute was violated in that the defendant failed to keep to the right of the center line of the pavement and carelessly and negligently drove and permitted his truck to be and travel in a northeasterly direction over and across the center line of the pavement. This instruction as drawn and tendered applied to all the counts of the declaration and therefore it was not error to refuse it as it was applicable to the fifth additional count of the declaration alone and directed a verdict.

Finding no reversible error in the record the judgment of the circuit court is affirmed.

Affirmed.

(Eighteen pages in original opinion)

PUBLISHED IN ABSTRACT

Milton Hay Brown and Stuart Brown, Partners, doing
Business as Haylands Farms, Inc., Plaintiff-
Appellee, v. Baltimore & Ohio Railroad
Company, a corporation, Defendant-
Appellant.

Appeal from Circuit Court of Sangamon County.

OCTOBER TERM, A. D. 1934. 278 I.A. 636⁵

Gen. No. 8861

Agenda No. 23

MR. JUSTICE DAVIS delivered the opinion of the Court.

This suit was originally brought by appellee in a Justice of the Peace court. In that court a judgment was rendered in favor of appellee, and an appeal was taken by appellant to the Circuit court of Sangamon county. The case was tried in that court without a jury, and a judgment rendered in favor of appellee in the sum of \$400.00, from which judgment appellant took an appeal to this court.

Appellee is engaged in the raising of thoroughbred cattle and the buying and selling of commercial cattle. On July 4, 1933, there were about 125 head of cattle in a pasture adjoining the right of way of the appellant's railroad. Appellant had erected a fence on a line between the pasture in which the cattle were and its right of way. A public highway adjoins the right of way of appellant, and its right of way lies between the pasture and the public highway. It appears from the evidence that during the night quite a number of cattle got out of the pasture through a break in this fence and wandered onto the public road, and the cow in question was hit by a truck and killed. There was a draw running through the pasture and across the railroad track, and over which is a railroad bridge and a hardroad bridge. The fence goes down through the bottom of this draw, and down at the bottom of the draw a post had been burned off and was lying on the ground, leaving a hole in the fence. Alfred Miller, who was employed by appellee and had been for a period of four and one-half years and who attended to the feeding and caring for the cattle, notified the depot agent of Sharpsburg, on July 1, 1933, that the fence was

in bad shape and needed repair, and the agent said he would notify the section foreman at once. The day after Miller notified the depot agent Stuart Brown, a partner of Milton Hay Brown, and manager of the Haylands Farm, told Frank Hill, the station agent in charge, that the fence was down.

Prior to the trial of the cause the defendant moved the court to require plaintiff to elect whether it was proceeding under the statute or at common law. The court took such motion with the case, and did not rule on the same at that time. The errors relied upon by appellant for reversal of judgment are: That the court erred in not allowing defendant's motion to compel the plaintiff to elect whether it was attempting to proceed under the statute or under the common law; that the court erred in admitting improper evidence on behalf of plaintiff; that the court erred in refusing to hold as law defendant's propositions, No. 2, 4, 6 and 8; that the findings of the court are contrary to the manifest weight of the evidence, and that the court's findings are contrary to the law in the case. Not all of the errors assigned are contained in appellant's brief and argument.

It is contended by appellant that appellee, in order to bring itself within the terms of the statute requiring railroads to fence their right of way must show that the damage was caused by the agents, engines or cars of the railroad and on its right of way.

The court did not err in not requiring appellee to elect whether it was attempting to proceed under the statute or at common law. The action of the court in taking the motion with the case and not ruling upon the same, and finding for plaintiff, amounts to a denial of the motion.

This action was brought in a Justice of the Peace Court, and in the Circuit court on appeal there was a trial de novo and no written pleadings were required, and in such cases the proof alone determines the right of recovery, and on a trial of the cause evidence tending to establish a violation of the statute or common law negligence is admissible, and plaintiff's right to recover depends upon the proof alone.

It is also contended by appellant that plaintiff failed to bring itself within the Statute; that the facts, as shown by the evidence taken even with the strongest inference against appellant, failed to establish liability because appellant is liable under the Statute only for damages caused by the agents, engines or cars of railroad companies and on its right of way. It is further

contended that at common law the railroad company was under no obligation to fence its right of way and that, therefore, the liability of appellant was governed entirely by the Statute.

In support of its contention appellant cites the case of *Schertz v. I. B. & W. Ry. Co.*, 107 Ill. 577, in which it is stated by the court that a single question arises on the record, and that is as to the true construction of the Statute. The Statute provides when fences required are not erected such railroad shall be liable for all damages done by the agents, engines and cars of such corporation. It was held that when a horse of plaintiff got onto the track and was frightened by the approaching train, and in its flight was injured by coming in contact with a wire fence, the railroad was not liable.

Appellant also cites other cases in support of its position, and among them the case of *Wabash R. R. v. Gaull*, admx. etc., 116 Ill. App. 443, in which it is held that a railroad company is under no common law duty to fence its right of way and the cause of action does not arise in favor of the personal representative of one who lost his life by reason of his team becoming frightened and running away and getting on the slant of the embankment of the railroad and thereby overturning his wagon and injuring him.

The case of *Stump v. C. & G. W. Ry. Co.*, 84 Ill. App. 28, was also cited, in which it appears that several horses of plaintiff got upon the right of way of the railroad, in consequence of the negligence of its servants in failing to close the gate or opening in the right of way fence. One of the horses became frightened and ran upon a bridge, and in attempting to rescene it the horse in its struggle to get free jumped and fell off the bridge and was killed. It is held in this case, in view of the holding in *Schertz v. I. B. & W. Ry. Co.*, *supra*, that there was no actionable negligence on the part of the railroad company.

It is contended that if appellee does not proceed under the Statute appellant does not owe it any duty to maintain any fence at all, hence no duty has been violated and there is no negligence. If plaintiff does proceed under the Statute, it fails to bring its case within the requirement of the Statute, under the facts. In cases of the character of this, it is necessary to aver and prove three elements to make out a cause of action: (1) The existence of a duty on the part of the defendant to protect the plaintiff from the injury of which he complained; (2) a failure of the de-

fendant to perform that duty; and (3) an injury to the plaintiff resulting from such failure. The facts must be sufficient to bring the right of recovery within some rule of law, statutory or common. *Miller v. C. & N. W. Ry. Co.*, 347 Ill. 493.

It is contended by appellee that the statutory action is not exclusive, that it does not preclude the existence of an ordinary common law action to recover for injuries caused by defendant's negligence in maintaining a right of way fence, citing 52 C. J., p. 36, where it is said: "Collisions with the train has been held essential under Statutes providing that the railroad shall be liable on failure to fence for animals killed or injured by the engines or cars of the railroad, or by its agents. * * * But even in those jurisdictions a recovery may be had for injuries to an animal resulting from a cause other than collision with the train, when it is sought on the grounds of the railroad's negligence in failing to perform its statutory duty to fence, provided only the injuries are the natural and proximate result of such negligence and plaintiff is the one to whom the duty to fence is owed. This is also held to be the law in *McClaskey v. R. R. Co.*, 174 Mo. App. 724; 161 S. W. 277; and *Eaton v. Miss. River R. R. Co.*, (Mo.) 209 S. W. 974.

Appellee admits that at common law the railroad company was under no duty to fence its right of way, but that irrespective of the fencing statute, once the fence was built by the railroad, the law imposed a duty to maintain it in proper repair, and that for appellant's negligence in failing to keep the fence in repair an action at common law would lie. It is an admitted fact that appellant erected and maintained the fence in question and that it became in disrepair and the agents of appellant were notified that the fence needed to be repaired.

In support of its position appellee cites the case of *C. & R. I. R. R. Co. v. Reid*, 24 Ill. 144, where a defective cattle guard had been allowed to remain within the corporate limits of an incorporated town and when, under the Statute, the railroad was under no obligation to build or to maintain a cattle guard, the Court said: "If the fact was, as the proof tends very strongly to show, that the cattle guard was built within a street, and was therefore within the limits of the town of Tiskilwa, it was the duty of the defendant to keep it in proper order. If it will obstruct the street with cattle guards, it cannot thereby excuse itself from keeping the cattle guard in repair." And also the case

of *L. & N. R. R. v. Shelton*, 43 Ill. App. 220, where a horse of the plaintiff wandered out of the pasture adjoining the right of way of the railroad through a defective gate and attempted to jump over a right of way fence on the opposite side and became entangled in that fence which was in bad repair and was injured. The Appellate Court in that case said: On behalf of appellant it is claimed no liability was shown by the proof because the animal was not injured by an engine or train, nor by the willful negligence of those in charge of an engine or train, and that at common law it was not required to fence its right of way. Conceding that the proof failed to establish a liability under the Statute against appellant to respond in damages for the injury alleged, we are unable to reach the conclusion that appellant is not liable at common law for the injury and damages resulting from the acts of negligence proven. In the case of *B. & O. S. W. R. R. Co. v. Seitzinger*, 116 Ill. App. 53, plaintiff's horse in attempting to jump from plaintiff's pasture onto the right of way where the grass was better became entangled in a defective fence along the right of way of the railroad and bled to death, the declaration contained two counts, the first based upon the Statute, and the other charged negligence in maintaining the fence. The Court said: It is contended that the second count of the declaration upon which the jury based its verdict was insufficient to support the judgment, the principal objection being that it does not contain any allegation that it was the duty of appellant to construct a fence at the point named or to keep it in repair. Such allegation was not necessary to entitle appellee to recover under this count. The proofs showed that appellant had constructed and maintained a fence at the point named, under such conditions it was the duty of appellant to keep the fence in such a state of repair as not to expose the stock of appellee to unnecessary danger. To the same effect was the opinion in the case of *C. & A. R. R. Co. v. Nevitt*, 122 Ill. App. 505.

Appellant having built and maintained the fence in question, in accordance with the provisions of the Statute, it was its duty to keep the same in such reasonable repair as to prevent stock being pastured on the land adjoining its right of way from getting through such fence, and appellee who had a large number of cattle in a pasture along such right of way had the right to presume appellant would keep its fence in repair, and if by reason of the negligence of appellant in not maintaining its fence in proper repair a large number of

cattle of appellee got out of said pasture and wandered on the hardroad adjoining the right of way of appellant and one of said cattle was killed by a truck traveling upon said hardroad, and plaintiff thereby injured, if such negligence of appellant was the proximate cause of such injury, then appellant would be liable. No question is raised by appellant as to whether its negligence in failing to repair the fence was the proximate cause of the injury to appellee.

The case was tried in June, 1934, and as to appellant's assignment of error, that the trial court failed to hold as law certain propositions submitted by it, we call attention to the fact that it is provided by Sub-sec. 2, Sec. 64 of the Civil Practice Act, Cahill's Rev. Stat. 1933, ch. 110, sec. 192, that: "No special findings of fact or propositions of law shall be necessary in any case at law tried without a jury, to support the judgment or as a basis of review." It will be seen that this provision above quoted differs somewhat from the former Statute in relation to the submission by a party to the court of written propositions to be held as law in a decision of the case, and upon which the court shall write "refused" or "held". Cahill's Rev. Stat. 1931, ch. 110, Sec. 61. This section 61, while it was mandatory as to the duty of the court in passing upon propositions of law submitted to it, left the matter of their submission to the will of the parties. *Smith v. Mayfield*, 163 Ill. 447.

Appellee contends that the court in any case at law tried without a jury, not being required by the terms of this statute to pass upon propositions tendered in writing to be held as law, no error can be assigned on the ruling of the court on propositions of law and that, by the repeal of the Practice Act of 1907, the legislature expressly did away with (1) the duty of the trial court to pass upon propositions of law submitted and mark them "refused" or "held" as the case may be, and (2) the right of the party submitting the same to except to the action of the court on such propositions. The omission from the Civil Practice Act of both the duty to pass on the propositions of law and the right of the parties to except to the action of the court clearly argue that, under the Act of 1934, the Judge is not only not required to act upon the propositions of law but, if he elects to act, his holdings cannot be the subject of exceptions upon which an appeal may be based.

Under the former practice it was held that to authorize the Supreme Court to pass upon the question of the sufficiency of the evidence or want of evidence to sustain the issues, where the case comes through the Appellate Court, the question must be preserved by one of three different ways. One was a demurrer to the evidence; another was a motion in the trial court to find for the party; and the third was propositions to be held as law. *Babbitt v. The Grand Trunk Western Ry. Co.*, 285 Ill. 267.

If the question of the sufficiency or want of evidence to sustain the issues was preserved by demurring to the evidence or by motion in the trial court to find for the party, then propositions to be held as law were unnecessary.

Section 92 (3b.) of the Civil Practice Act, provides: "Error of fact, in that the judgment, decree or order appealed from is not sustained by the evidence, may be brought up for review in any civil case: *Provided*, that, except as to the equitable issues, the Supreme Court shall re-examine cases brought to it by appeal from the Appellate Courts, as to questions of law only." This section contains the same provisions as Section 122 of the Practice Act of 1907, in that it provides that the Supreme Court shall re-examine cases brought to it by appeal from the Appellate Court as to questions of law only, and so of necessity some appropriate action in the trial court is required in order to save the question for review, and the provisions of Sec. 92, (3b), of the Civil Practice Act being the same as were the provisions of Sec. 122 of the Practice Act of 1907, propositions to be held as law, while not the only way in which the point can be saved would in our opinion be a proper method.

While the Act provides that no propositions of law shall be necessary in any case at law tried without a jury to support the judgment or as a basis of review, it does not in terms abolish them, and like any other motion in the trial court, the refusal of the trial court to consider it or a denial of the same by the court may be raised in the reviewing court when preserved by proper objection in the trial court, and the question of the sufficiency of the evidence to sustain the issue in the case can as well be preserved by submitting written propositions of law, as by demurring to the evidence or by submitting a motion to find for the party.

In the case of *Union Traction Company et al v. The City of Chicago*, 202 Ill. 576-585, our Supreme Court

said: "The section of the Practice Act providing for the submission of propositions of law to the trial court in cases triable by a jury but wherein the intervention of a jury has been waived was enacted in 1872. (Laws of 1872, p. 345.) The Appellate Court did not then exist, and appeals in all cases were then taken to this court and writs of error issued out of this court in all cases. The act establishing the Appellate Court was adopted in 1877, some five years after the enactment of the statutory provision with relation to the presentation of propositions to be held as the law of a case by a trial judge." "The purpose to be subserved by propositions of law is to determine whether the trial judge entertains correct views of the principles of law involved in the proceeding. In some instances it is only through the medium of such propositions that the record can be made to show the views of the court as to the principles of law applicable to the facts of the case." See also *Fuchs & Lang Manufacturing Co. v. Kittredge & Co.*, 242 Ill. 88-99.

The error relied upon by appellant in its statement of the case, that the court erred in refusing to hold as law certain propositions submitted by it to the court, is not contained in its brief of authorities nor commented upon in its argument and is therefore waived, but we have examined such propositions and are of opinion that the court committed no reversible error in refusing to hold as law such propositions so submitted by appellant. Under the law and the evidence in the case the court was justified in awarding a judgment in favor of appellee, and such judgment is therefore affirmed.

Affirmed.

(Ten pages in original opinion)

Gen. No. 8864 - 1934

#150

PUBLISHED IN ABSTRACT

78 A

Illinois Midwest Joint Stock Land Bank, of Edwardsville, Illinois, a Corporation, Plaintiff-Appellant, v. Martha A. Pomroy, et al., Defendants-Appellees.

Appeal from the Circuit Court of Hancock County.

OCTOBER TERM, A. D. 1934.

278 I.A. 637¹

Gen. No. 8864

Agenda No. 26

MR. JUSTICE DAVIS delivered the opinion of the Court.

This was a bill in chancery filed by appellant, Illinois Midwest Joint Stock Land Bank, of Edwardsville, Illinois, to foreclose a mortgage. A decree of foreclosure and sale was entered on April 21, 1933, and the mortgaged premises were advertised for sale at 10:00 a. m., May 25, 1933. On that day L. J. Koch, intervenor and appellee, who was not a party to said proceeding, appeared before the court and moved to be substituted as party complainant or joined with appellant in the foreclosure proceeding and for a modification of the decree of sale. He filed his motion and petition, and prior to the sale on that day, the court entered an order allowing Koch to intervene and interplead, in said foreclosure proceedings, and ordered that appellant make a counter showing to the petition on or before June 5, 1933, and continued such sale to June 20, 1933. Appellant filed a motion to strike the petition from the files which was overruled; and thereupon it replied to the petition. The intervening petition filed by Koch averred in substance that he had a contract for a deed to the lands foreclosed, upon which he had made a payment of \$600.00; that after entering into such contract with Koch appellant wanted an additional down payment of \$1,700.00 on the contract, whereupon he wrote a letter to appellant, under date of November 26, 1932, making an offer differing in terms from the offer first made, and that appellant accepted the offer made in that letter by resolution, and thereafter endorsed, ready to be delivered, the note and mortgage which was sought to be foreclosed by appellant, and proceeded to carry out the contract; that after some considerable effort appellant was unsuccessful in securing a release of a third mortgage which was mentioned in the letter written by Koch to appellant, and requested the return of

the abstract which had theretofore been sent to the agent of Koch, and stating that it would cancel the contract and also offering to return the \$600.00 which had been paid by Koch to appellant at the time the original contract was claimed to have been procured by Koch, and that Koch refused to return the abstract or to accept the return of the money.

Appellant thereafter, on February 14, 1933, wrote, stating that it did not recognize any contract as existing between it and Koch, and stating further that no contract had been signed and that the board of directors was not willing to accept the sum of money offered, and that appellant would foreclose its mortgage, and again offering to return the deposit and requesting the return of the abstract. The petition avers that Koch replied by his agent on February 15, stating that the mortgage had been assigned, a resolution passed confirming the offer to purchase as made in Koch's letter of November 26, 1932, and stating that appellant had retained the down payment and that Koch would hold it to the contract, and stating that in foreclosing its mortgage appellant was doing what it had agreed to do. The petition also alleges that appellant, knowing of the existence of said agreements and contracts with Koch, filed its bill to foreclose without making him a party complainant or defendant; that he had no knowledge of the decree of sale until within the last two or three days and that, since learning of the sale, he had taken up with appellant the question of his rights and learned that it did not expect to recognize such contracts. In the petition Koch offers to pay appellant \$8,250.00 less than \$600.00 theretofore paid, and to pay the court costs in the foreclosing of said mortgage or give bond covering the same.

The petition prays for an order substituting Koch as complainant in the foreclosure proceedings or joining him with appellant as complainant, and that the decree of sale be modified so as to fully protect the rights of Koch in said note and mortgage and in said land, or for such order as will give him an opportunity to have his rights in the subject matter of said suit adjudicated.

Appellant's motion to strike sets up as grounds that the petition does not show cause for intervention of a court of equity; that if any remedy exists it is at law; that no grounds for specific performance are shown; and that the grounds relied upon by petitioner are uncertain, indefinite and not such that the court can

determine specifically that any contract was entered into. Appellant's reply to the petition avers that Koch was not entitled to equitable relief, there being an adequate remedy at law; that the instrument, bearing date October 27, 1932, is not a contract; that it was never signed or delivered, and that the letter of Koch does not constitute a contract; that the conditions therein expressed are inconsistent with the alleged contract of October 27, 1932, which Koch maintained was still in force, and stated that he expected to hold appellant to it; that the same contained conditions which appellant could not comply with and would not in equity be compelled to comply with; that Koch refused to alter or change or release the same, and that he thereafter made other and further offers, yet maintaining at the time of making same that he had other contracts with appellant covering the same subject matter which were in force and that he was looking to appellant for a strict compliance therewith; that the petition filed by Koch does not stand upon any particular agreement, but refers to certain alleged agreements, and omits and refuses and fails to mention other correspondence and facts bearing upon the issues. Appellant denies that there is any contract existing between it and Koch, and prays that the court will deny and refuse to substitute Koch as complainant or permit him to be joined as complainant with appellant, and that the court will refuse to modify or change the decree of sale; and that the petition may be dismissed.

The court thereupon declared the matter in reference to Koch's petition at issue, and referred it to the Master to take and report the evidence with his conclusions.

The Master filed a report showing a hearing upon the intervening petition of Koch and the reply of appellant to said petition, in which he found that on October 27, 1932, Petitioner's Exhibit 1 was prepared by petitioner and the witnesses, L. J. Montgomery and H. U. Landon, and that at the time of the preparation of said exhibit Koch delivered to Landon his check for \$600, which was taken together with said Exhibit 1 by Landon to appellant for its approval; that Landon was chief appraiser for appellant and was authorized to submit to it offers for the purchase of real estate; that appellant owned a note for \$16,000.00, signed by William G. and Martha A. Pomroy, dated January 23, 1933; that a contract was completed between the petitioner and respondent for the purchase of said note

and mortgage, and that petitioner proved the material allegations of his petition and should be decreed to be joined either as a co-complainant in the foreclosure proceeding or a defendant therein; and the interests of petitioner in the note and mortgage sought to be foreclosed should be found and declared, and it should be decreed in equity that the petitioner is the owner of said note and mortgage, and that upon payment by him to appellant of the sum of \$7650.00 he should be decreed to be the legal holder and owner of said note and mortgage, and the sum of money found to be due thereunder, by foreclosure decree of April 21, 1933, should be declared to be due to petitioner and that he should be subrogated to the right of appellant in the foreclosure proceeding and permitted to proceed with the foreclosure under said decree pursuant to the terms and conditions of said contract between him and appellant, consisting of Petitioner's Exhibits Nos. 4 and 5, and that by decree the court should require petitioner to save and keep harmless appellant from and on account of all costs incurred in the foreclosure of said mortgage.

Appellant filed objections to each and every finding and conclusion of the Master, and further objected that the Master heard improper evidence and that he recited in his report certain portions of the evidence introduced before him, and has considered the same, but has apparently failed to consider other evidence in the case which would call for a contrary finding and conclusions; that his conclusions are not in keeping with the facts proved nor as they are found; that the Master has drawn conclusions that are contrary to the law in the case, and that the findings and conclusions of the Master, that a contract existed between petitioner and appellant, are not supported by but are contrary to the evidence; that the Master should have found and concluded that no contract existed between the petitioner and appellant at the time of the filing of the petition herein, and that petitioner has not made a case justifying specific performance, or any other equitable relief.

It was ordered by the court that the objections to the Master's Report stand as exceptions in the circuit court, and upon a hearing thereon the court overruled said exceptions and entered a decree in accordance with the findings of the Master, and by the terms of which decree the court finds that the equities of the cause are with the petitioner, and that he is entitled to the relief prayed for in the petition. The decree

orders that Koch within thirty days from the date of the decree pay to appellant the sum of \$7650.00, being the said \$8250.00 less the \$600.00 already in the hands of appellant, belonging to Koch and retained as the property of said bank; that Koch shall save and keep harmless appellant from and on account of all court costs incurred in the foreclosure of said mortgage, and that the decree of foreclosure heretofore entered in this cause, on April 21, 1933, is amended by finding that Koch was the legal owner and holder of the note and mortgage in question; and that the same is a first lien on the real estate described in the mortgage; and the decree be further amended by striking out of said decree the word "complainant" in places wherever it occurred and inserting the name of L. J. Koch; and it was ordered that said decree of date of April 21, 1933, as amended, stand as a decree of sale in said foreclosure proceeding, and that the Master proceed to advertise and sell the premises in accordance with the terms of said decree as modified, and that Koch have a right to bid upon said mortgaged premises at said sale, and be regarded by the Master as the owner and legal holder of the note and mortgage.

From the evidence reported by the Master it appears that on October 27, 1932, Herbert U. Landon, who was serving as chief appraiser for appellant and who had authority to procure proposed tentative contracts for the sale of lands belonging to appellant, accompanied one August W. Wipff to Keokuk, Iowa, where a conference was had with appellee, Koch, relative to his purchasing the lands which were foreclosed and ordered sold by the terms of the decree in said cause; and on that day a contract was prepared in the office of one L. J. Montgomery, at which time Mr. Landon was present and offered suggestions as to what the instrument ought to contain, and he told Koch at that time a deposit would be required to accompany the contract when it went to appellant for approval. This contract, after being prepared, was signed in triplicate by Koch, and his check for \$600.00, payable to appellant, was executed and both were delivered to Landon, who sent them to appellant for its approval; which contract, Petitioner's Exhibit 1, was in substance, as follows: It recited that it was made and entered into on October 27, 1932, between Koch and appellant, in which appellant agreed to furnish, convey and assure to Koch, in fee simple, clear of all incumbrances by a good and sufficient warranty deed (the premises in controversy), and appellant

dated October 27, 1932, for the purchase of the following property, to-wit, (the premises in controversy,) I wish to state that your representative, Max U. S. Colbert, was here to-day claiming you should have \$1,700.00 additional down payment on the contract. A very few days after signing the contract you cashed the \$600.00 check and you have held the cash a month, which amounts to an acceptance of the contract and I still hold you to it. However, it has been suggested that a cash offer for the note and mortgage would suit you, and I have been requested to make such cash offer, payable at once. If you will furnish an abstract showing a good marketable title to the above land, subject to your mortgage, and will assign the note and mortgage to me, I would be willing to make a cash payment of \$8,250.00 for your note and mortgage, subject to immediate acceptance, on the following conditions. (The \$600.00 paid to be applied on the \$8,250.00.) You to furnish me a certified copy of a resolution of your Board of Directors, authorizing the transfer of the note and mortgage to me; you to join in the suit as plaintiff with me so I can acquire all of your rights under the note and mortgage and the right to foreclose the note and mortgage in order to protect my interests. This offer is made with the understanding that I can secure the rent for the coming year. You to secure and turn over to me a release from the Hamilton Bank, which owns the second mortgage, so that it will not be necessary to make them a party to the suit, and you are also to secure a release of the \$3,000.00 third mortgage, or a waiver, so that it will not be necessary to make the party holding the \$3,000.00 note and mortgage a party to the suit. The abstract must also show that all taxes have been paid except the taxes due and payable in the year 1931 and 1932. The purchase of the note and mortgage is made only with the understanding that there is due on the principal of the note at this date the sum of \$14,400.00. Please let me hear from you regarding the above at once.

Upon the receipt of this letter appellant passed a resolution by its board of directors and also endorsed the note and mortgage to Koch, but did not deliver the same; the resolution was offered in evidence, and was marked Petitioner's Exhibit 5, and was as follows: It recited that appellant was the owner of the note and mortgage, made by William G. Pomroy and wife, in the sum of \$16,000.00, and that there was due upon the principal, \$14,168.48 on February 18, 1932;



and that that amount is still due, and that L. J. Koch, of Keokuk, Iowa, made a proposition in writing, dated November 26, 1932, to purchase said note and mortgage for a cash payment of \$8,250.00 under certain terms and conditions, mentioned in said letter, and that whereas in the opinion of the board of directors of appellant it is for the best interests of the bank to accept said offer on the conditions mentioned and named in said letter on November 26, 1932.

Therefore, be it resolved by the Board of Directors of the Illinois Midwest Joint Stock Land Bank, of Edwardsville, Illinois, that the offer of Koch be and the same is accepted, and that this bank shall comply with all of the terms and conditions of said offer, and that the assignment of said mortgage on the back thereof, dated November 29, 1932, in the name of this Corporation and signed by Frank Godfrey, President, and attested by Joseph M. Pyle, Secretary, and the assignment of said note to Koch, bearing the same date, by said officers, be, and their acts are, hereby ratified and confirmed.

Be it further resolved that one of the conditions in the offer to purchase said note and mortgage was that the Illinois Midwest Joint Stock Land Bank, of Edwardsville, Illinois, formerly known as the Midwest Joint Stock Land Bank, of Edwardsville, Illinois, was to join in the suit as plaintiff with Koch so that he could acquire all of the rights of said corporation under the note and mortgage and the right to foreclose the note and mortgage in order to protect the interests of Koch. It is further resolved that all of the other terms and conditions in said acceptance be by said corporation complied with and accepted and carried out, and that the President, Frank Godfrey, and the Secretary, Joseph M. Pyle, or either of them or their successors in office be, and they are, hereby authorized to carry out all the terms and conditions of said proposal of purchase, which Exhibit was certified by the secretary of appellant as having been adopted on December 1, 1932.

No delivery of the note and mortgage was ever made. Appellant attempted to comply with the conditions of said offer contained in said letter and acceptance of the same by appellant and found that it could not obtain a release of the third mortgage, and immediately wrote a letter to Koch informing him of such fact and asking him to waive such conditions as could not be met with. Koch replied in a letter, insisting that the contract be complied with. While he insisted that ap-

pellant go on with the contract as made, yet if appellant was absolutely unable to comply with part of it in order to straighten the matter out, Koch was willing to pay \$8,000.00 for the first note and mortgage. That is, he would pay \$7,400.00 in addition to the \$600.00 that appellant already had, making a total of \$8,000.00. Appellant replied that it was not certain that the executive committee would approve the sale of the note and mortgage at the purchase price indicated in said letter, and that they preferred to commence foreclosure proceedings, which later could be dismissed in case the sale was made to Koch and asking for a return of the abstract and offering to return the \$600.00. Koch refused to accept the return of the \$600.00 and cancel the agreement, and insisted that appellant perform the conditions of the contract, and stated that he had purchased the farm in good faith and that he expected appellant to go through with its contract, and that he was ready and willing to comply with his contract.

Appellant stated that it did not recognize any contract as existing between it and Koch, and that it had not signed any contract, and its board of directors was not willing to accept the sum of money offered for the farm, and that it was foreclosing the mortgage.

Appellant in its brief contends that the court erred in overruling its exceptions to the Master's Report, and in finding that the equities of the cause were with the petitioner and that he is entitled to the relief prayed for in his intervening petition; that said intervening petition should have been stricken; that the court erred in decreeing that appellant accept the \$8,250.00 from Koch, and in finding that Koch was entitled to intervene in the foreclosure proceeding, and in amending and modifying and changing the decree of foreclosure and sale, of April 21, 1933, so as to show Koch to be the owner and holder of said note and mortgage and entitled to the benefits of said decree in lieu of appellant and entitled to have said premises sold under said decree, as amended, changed and modified.

Appellants contends that no contract ever existed between it and appellee; that Exhibit 1 was never signed by appellant nor were its terms ever accepted; that appellee prays for an order substituting him as complainant in the foreclosure proceeding and that the decree of sale be so modified as to fully protect his rights without specifying any particular contract justifying such relief; that he failed to mention in his petition any specific contract or what his rights were under

the same; that no mutuality is shown to have existed at the time appellee claimed this contract (Exhibit 4) was entered into; that when it notified appellee it could not get a release of the third mortgage and appellee not having waived such condition, that a suit for specific performance would not lie, and the filing of a bill in equity to compel a conveyance without the performance of such condition would not effect a waiver; that the subject matter of the alleged contract was personal property, the note and mortgage, and that the general rule is that equity will not entertain jurisdiction for specific performance of contracts respecting personalty; that the decree of the court does not enforce either of the alleged contracts according to their terms.

Appellee says that no claim is made by him that Exhibit 1 ever became a contract between the parties, but does claim that this Exhibit 1 and the facts and circumstances surrounding its drafting are material, and discloses that he was interested in obtaining title to the land and not merely in the mortgage as personal property; that his letter of date, November 26, 1932, (Exhibit 4,) to appellant was unqualifiedly accepted by it by resolution adopted by its board of directors, and that the adoption of this resolution was communicated to his agent, and that such offer and acceptance resulted in a contract between the parties; that the contract is not one referring to personal property. The parties had in mind, through all the negotiations from the very beginning, that appellant expected to take title to the land and to sell the same to appellee; that appellee, in his intervening petition, waived the performance of every part of the contract except the assignment of the note and mortgage to him, and the giving of the advantage of the decree of foreclosure to him upon the payment of the agreed price.

We are of the opinion that the contention of appellant that no contract ever existed between it and appellee is without merit. The offer made by appellee in his letter of date, November 26, 1932, and the acceptance of the same by resolution passed by the board of directors of appellant resulted in the making of the contract between the parties, and there is no merit in the contention of appellant that the parties did not contemplate a contract until the conditions set forth in the letter of appellee had been performed, or that there was a want of mutuality at the time the contract was entered into, because on the part of appellee was an offer to pay the sum of \$8,250.00 cash for the note and mortgage under the conditions set forth in the letter,

and on the part of appellant was an acceptance of such offer upon the terms and conditions set forth in said letter by resolution of its board of directors.

While the evidence discloses that claims were made by appellee as to the existence of other and different contracts, there can be no controversy as to whether the contract entered into by the offer contained in the letter of appellee and the acceptance of the terms thereof by appellant existed between said parties. The subject matter of this contract was the purchase of personal property, and the general rule is that equity will not entertain jurisdiction for the specific performance of contracts relating to personal property, unless there is a showing that the relief at law might not be adequate, as where the thing contracted for has to the complainant some intrinsic or special value, and the like. *Cohn v. Mitchell*, 115 Ill. 124.

In this case it appears from the evidence that the parties had in mind, from the beginning of negotiations, that appellant would finally take title to the land and that it desired to sell the same to appellee. Exhibit 1 contemplated a foreclosure of the mortgage or the obtaining of a deed from the mortgagors to appellant, and also the contract as finally consummated contemplated a foreclosure of the mortgage, and the purpose of the parties was to have appellee acquire title to the land in question; and under the facts as disclosed by the evidence a court of equity would be authorized to entertain jurisdiction of said cause, the specific performance of such contract being the only means by which appellee could obtain title to the real estate.

The existence of a remedy at law does not deprive equity of jurisdiction unless such remedy be adequate. That is, it must be clear, complete, and as practical and efficient to the ends of justice and its prompt administration as the remedy in equity. *McGinniss v. First National Bank of Canton*, 214 Ill. App. 295-299; *People v. Bordeaux*, 242 Ill. 327-333; *Barton v. DeWolf, et al*, 108 Ill. 195-197.

“The rule ‘is not to entertain jurisdiction, in equity, for a specific performance of agreements respecting goods, chattels, stock, choses in action, and other things of a merely personal nature; yet the rule is (as we have seen) a qualified one, subject to exceptions, or, rather, the rule is limited to cases where a compensation in damages furnishes a complete and satisfactory remedy.’ (2 Story’s Eq. sec. 718.) Thus it is seen that a court of equity will not exercise jurisdiction where

there is a complete and satisfactory remedy at law." *Barton v. DeWolf, et al, supra.*

Although appellant was unable to procure a release of the third mortgage mentioned in the letter of appellee in his offer to buy the note and mortgage, yet appellee had a right to waive such condition and the filing of his intervening petition, and offer to accept the note and mortgage without a compliance on the part of appellant of such condition was a waiver thereof.

Courts of equity will not deny specific performance of a part of a contract which is capable of being performed because the contract as a whole is incapable of performance. *Kuhn v. Sohns*, 324 Ill. 48-54; *Moore v. Garigietti*, 228 id. 143; *Work v. Welsh*, 160 id. 468; *Shirley v. Spencer*, 4 Gilm. 583.

Appellant denied the existence of a contract between it and appellee whereby it agreed to assign the note and mortgage in question to appellee, and appellee was compelled to resort to a court of equity in order to protect his rights under such contract, and it would appear that appellant is estopped from now urging that it could not procure a release of this third mortgage and claiming that as appellee refused to waive such condition, that he could not enforce his rights in a court of equity and require appellant to perform its contract without obtaining such release.

Where a party to a contract refuses to perform and bases his refusal on one ground he waives all other grounds, and is estopped, when suit is brought, from setting up other grounds for his refusal. *Kuska v. Vankat*, 341 Ill. 358.

Courts of chancery have a large discretion in this class of cases. It is a judicial discretion, to be exercised in conformity with certain fixed and well recognized principles which govern courts of equity and is therefore subject to review. A court of review, however, before interposing in any case must be able to say there has been an abuse of this discretion. It results from this general principle, that every case of specific performance must necessarily depend in a large degree upon its own special circumstances. *Cohn v. Mitchell*, 115 Ill. 124-131.

We are of opinion that under the facts in this case that the decree of the circuit court should be affirmed.

Affirmed.

(Fifteen pages in original opinion)

Abstract
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PUBLISHED IN ABSTRACT

Isabel Newton Oliver, Appellant, v. Estate of Levi Walker, Deceased, Appellee.

Appeal from Circuit Court of Christian County

OCTOBER TERM, A. D. 1934

279 I.A. 637-2

Gen. No. 8867

Agenda No. 29

MR. JUSTICE DAVIS delivered the opinion of the Court.

This case originated in the County Court of Christian county by the filing of a petition in the estate of Levi Walker, deceased, by Isabel Newton Oliver, appellant, praying that an order be entered in said cause directing the administrator de bonis non with will annexed of said estate to transfer to her a certain treasury note, given appellant as her property; said note being found in a safety deposit box in an envelope directed to her upon being opened at the death of said Levi Walker.

Levi Walker was a man nearly 90 years of age and lived in Pana, Illinois, with a Mrs. Smith; he died in the early part of December, 1932. During his life time he was acquainted with Isabelle Newton Oliver, who prior to her marriage in February, 1934, was Isabelle Newton, a distant relative of the deceased, residing at Wood River, Illinois.

On November 28, 1932, Levi Walker requested Louise Gellmeier, who was a daughter of Mrs. Smith with whom he lived, to write the following letter for him, addressed to Isabelle Newton, at Wood River, Illinois: "Dear Isabelle:

The bonds which I had in the bank at Wood River, Illinois, I brought here with me and I divided them between you and Mrs. Smith, with whom I live. When I die Mrs. Smith will send a telegram for you to come to my funeral. I want you to write me when you have any good news. I like to hear from you. Your part is in an envelope for you, unless something happens, and Mrs. Smith will see that you get it. I know I can trust her."

This letter was signed,

"Louise Gellmeier,
Levi Walker."

Mrs. Gellmeier testified she wrote the letter and that her name and the name of Mr. Walker were signed to

the letter, and that he signed his name in her presence. She testified that she did all of his correspondence, and that Mr. Walker was an old man but was not sick and had not been in bed; and that he had gone to an undertaker and made provisions for his burial; that her mother, Mrs. Smith, had the key to Mr. Walker's safety deposit box; the key was given to her by Mr. Walker on the day that Mr. Walker took her mother down to settle up this business at the bank. This was a short time before his death, a week or so before the letter was written. The key was not given to my mother in my presence, but when she came out of the bank she said she had it, and I saw it. There were two letters found in his box, one addressed to my mother and the other letter in the box to Isabelle Newton.

Appellee was sworn as a witness and testified that she was notified of the death of Levi Walker, and went to Pana and took the letter with her, and was told by Mrs. Smith that she could not get the bond for her and advised her to employ a lawyer.

It was stipulated between the parties that when the box was opened they found an envelope, marked "Isabelle Newton, Wood River, Illinois," and found a \$500.00 bond in the envelope; that it was taken by the executor after the will was admitted to probate, and that the will was found in the box after the death of Levi Walker. The will was offered in evidence and was executed on July 2, 1928, and disposed of all of his property of every kind and nature. Upon a trial of said cause in the County court an order was entered granting the prayer of the petition and directing Walter Kuhn, administrator de bonis non with will annexed, of the estate of Levi Walker, deceased, to deliver to the petitioner one U. S. Treasury note, described in the petition; said bond being for the sum of \$500.00.

An appeal was taken by said administrator de bonis non with the will annexed of the estate of said deceased to the Circuit court of Christian county, and upon a trial of said cause it was ordered by said court that judgment be entered in favor of the executor and that the petitioner pay the costs, and said cause is here on appeal taken by said petitioner.

It is contended by appellant that the circuit court erred in holding there was no sufficient delivery of the subject matter of the gift in question upon the facts shown; that a gift causa mortis is consummated when there is, as here, a delivery symbolically had to one of two donees and the gift is otherwise complete.

In *Telford v. Patton*, 144 Ill. 611-619, it is said: "There are three requirements necessary to constitute a donatio causa mortis: 1, the gift must be with a view to the donor's death; 2, it must have been made to take effect only in the event of the donor's death by his existing disorder; 3, there must be an actual delivery of the subject of the donation." See also, *Chicago Savings' Bank & Trust Co. v. Cohn*, 197 Ill. App. 326-328.

To constitute a valid gift inter vivos, possession and title must pass to and vest in the donee irrevocably. In this respect, alone, a gift causa mortis differs from a gift inter vivos, as in the case of the former it is revocable on the recovery of the donor, therefore a proposed gift to take effect only upon the death of the donor, being in its nature testamentary, will not be sustained as a gift causa mortis. The donor must part with all control of the property in order to make a valid gift. If he reserves any right or title, the gift will be incomplete. *Barnum v. Reed*, 136 Ill. 388-398. In this case there was no gift inter vivos, nor was such a gift even contemplated.

Anticipation of death being the legal motive of making the gift, it follows that the donor must anticipate death from some existing infirmity or impending peril. It can hardly be contended that at the time that it is claimed that the gift causa mortis was made that Levi Walker anticipated death from any existing infirmity or impending peril. He was about ninety years of age, but was not sick and had not been in bed, and although he had gone to an undertaker and made provision for his burial, yet it does not appear that his expectation of death was other than that general expectation that all rational persons of mature years have, that they must die sometime, and that because of advanced years that death might be expected at any time.

The only evidence of a gift causa mortis is contained in the letter written by Levi Walker to Isabel Newton, in which he informed her that he had the bonds with him that had been in the bank at Wood River, Illinois, and that he had divided them between her and Mrs. Smith, with whom he lived; that when he died Mrs. Smith would send her a telegram; that her part was in an envelope, unless something happened, and Mrs. Smith will see that you get it.

From this letter it clearly appears that his intention was to give Isabel Newton the bond referred to, but that she was not to come into possession of the same

until after his death, and not then if something should happen, thus still retaining control over the disposition of the subject of the gift.

There must be an actual delivery of the gift to the donee so as to transfer possession to him, but a delivery to a third person for the benefit of the donee will be sufficient provided the donor parts with all control over the subject of the gift; but as long as the donor retains control over it the holder is regarded as his agent, and the direction to keep it for the donee will not amount to any present delivery sufficient to create a *donatio causa mortis*. The only evidence that Levi Walker ever made a delivery of the bond in question was the stipulation contained in the record that the bond was found in his safety deposit box in the bank in an envelope upon which the name and address of Isabelle Newton was written, and the evidence that Walker delivered a key to his box to Mrs. Smith. He never delivered the bond to Isabelle Newton, nor to any third person for her, but retained the same in his safety deposit box which was always under his control, as shown by the fact that upon his death the same was turned over to the executor of his will, and Mrs. Smith, although she might have had a key to the box, had no control over it as evidenced by the fact that she informed Isabelle Newton Oliver that she could not get the bond for her, and advising her to employ an attorney.

We are of opinion that two essential elements of a valid gift *causa mortis* are lacking: First, the evidence fails to show that the gift was made in view of his death; and second, no delivery of the bond was ever made.

The proposed gift to Isabelle Newton was intended by Levi Walker to take effect only upon his death and was, therefore, testamentary in its nature and cannot be sustained as a gift *causa mortis*.

The judgment of the Circuit Court of Christian County is affirmed.

Affirmed.

(Five pages in original opinion)

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There must be an actual delivery of the gift to the donee so as to transfer possession to him, but a delivery to a third person for the benefit of the donee will be sufficient provided the donor parts with all control over the subject of the gift; but as long as the donor retains control over it the holder is regarded as his agent, and the direction to keep it for the donee will not amount to any present delivery sufficient to create a *donatio causa mortis*. The only evidence that Levi Walker ever made a delivery of the bond in question was the stipulation contained in the record that the bond was found in his safety deposit box in the bank in an envelope upon which the name and address of Isabelle Newton was written, and the evidence that Walker delivered a key to his box to Mrs. Smith. He never delivered the bond to Isabelle Newton, nor to any third person for her, but retained the same in his safety deposit box which was always under his control, as shown by the fact that upon his death the same was turned over to the executor of his will, and Mrs. Smith, although she might have had a key to the box, had no control over it as evidenced by the fact that she informed Isabelle Newton Oliver that she could not get the bond for her, and advising her to employ an attorney.

We are of opinion that two essential elements of a valid gift *causa mortis* are lacking: First, the evidence fails to show that the gift was made in view of his death; and second, no delivery of the bond was ever made.

The proposed gift to Isabelle Newton was intended by Levi Walker to take effect only upon his death and was, therefore, testamentary in its nature and cannot be sustained as a gift *causa mortis*.

The judgment of the Circuit Court of Christian County is affirmed.

Affirmed.

(Five pages in original opinion)

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STATE OF ILLINOIS,
APPELLATE COURT,
FOURTH DISTRICT.

October Term, 1934.

Agenda 10.

278 I.A. 637³

Freda Herman,

Appellee,

vs.

Chapman Hotel Corporation,

Appellant.

Appeal from Circuit Court of

St. Clair County.

EDWARDS, P. J.

Plaintiff brought suit against defendant to recover damages for injuries claimed to have been sustained by falling down a stairway in the Hotel Belleville, operated by defendant, on December 19, 1933. She had a verdict for \$7,500, upon which the court entered judgment, and to reverse which defendant prosecutes this appeal. The ground alleged for recovery is that defendant negligently permitted such stairway to become wet, and thereby dangerous, and further, that it negligently failed to keep same properly lighted; in consequence of which plaintiff, while descending the stairway, fell and was injured.

Plaintiff's contentions are that the stairway, on the day in question, which was rainy, was made wet by people who entered the hotel from the outside, and who were going to the basement by these stairs, and who were tracking water from their shoes upon the treads of the steps; thus causing them to become wet and slippery, and creating a dangerous condition which was accentuated by the fact that the stairway did not have sufficient light to disclose such situation; and further, that no mats were

kept on the lobby floor, at the head of the stairs, to prevent tracking of water on the steps.

Appellant raises the question that the complaint is defective for want of proper averments; the answer to which is, that defendant did not attack the complaint in the trial court, but filed an answer thereto, upon which issue was joined and the cause tried; hence the objections now urged are held waived. Sec. 42 (3) of the Civil Practice Act, provides, that "all defects in pleadings, either in form or in substance, not objected to in the trial court, shall be deemed to be waived."

It is earnestly contended that the court should have sustained defendant's motion for a directed verdict at the close of plaintiff's case.

The stairway in question descended from the lobby of the hotel to the basement, where were located a coffee shop, barber shop and lavatory. It was somewhat circular, winding to the left, the seventeenth tread from the top extending forward to form a platform of about $4\frac{1}{2}$ feet in length and about 5 feet wide, and from this platform five additional steps ran to the basement floor. The treads of the steps, as well as the basement floor, were made of terrazzo, a composition of cement and marble, the treads being about one foot wide and the risers six inches high, while on either side of the stairway was a hand rail for the convenience of those using it as a passageway. The upper part of the stairway was lighted by the daylight from the lobby. About the middle of the stairs was an electric light, of 60-watt capacity, on the left wall; and at the foot of the steps, suspended from the ceiling, a 100-watt light.

Plaintiff testified that on the day in question she came to the hotel about 9 o'clock A. M., to visit the barber shop in the basement, conducted by her brother, for the purpose of having her hair cut, and also to deliver to her brother a pair of trousers which he, by telephone, had requested her to bring to him. That it was raining, and that she saw

moisture on the lobby floor at the head of the stairs, presumably tracked in by persons entering the hotel from out of doors. That she started to descend the steps, with her hand on the railing, and that when she reached the platform, her feet went out from under her, and she slid the remaining five steps to the basement floor. That her coat, which was dry when she came in, was, after the fall, wet on the back, but not in front. That the stairway seemed dark, and that she just followed it down; and that, as a result, she sustained a fractured coccyx, and internal abdominal injuries.

Fred Sturm, a barber, and brother of plaintiff, testified that he helped pick her up after she had fallen; that her coat was wet on the back, but not in front, and that he noticed, at that time, water on the steps. He further stated that he had gone up this stairway shortly before that time to telephone his sister, and afterwards retraced his steps, but did not, at either of such times, observe any moisture on the steps.

Lindell Wiley, colored porter for Sturm, was called as a witness. He stated that the basement floor was tracked with water from the shoes of those who had descended the stairs; that he arrived at the shop about 8 o'clock A. M., going by way of the staircase; that he saw, at about 8:30 o'clock A. M., water tracks on the stairway; that he saw water all the way down the steps; that, "I saw it all the way down the steps; it was easy to be seen; if you looked right down you couldn't help but see it;" that there were puddles all the way down the stairs, and that every tread had some water on it; and that he saw plaintiff just after the fall, and that the back of her coat and her left glove were wet.

These were the only witnesses for the plaintiff who testified to the accident, or the condition of the stairway about the time of its occurrence. In addition, plaintiff proved, over the objection of the defendant, that the stairs were always wet from the tramping of people, when the day was rainy. Defendant insists that such testimony was erroneously admitted. However that may be, the defendant likewise introduced much proof to the

effect that on such rainy days, the stairs were not wet or damp. By so doing, defendant precluded itself from questioning the court's ruling. Where a party does not abide its objection, but makes proof of the same character to which it objected, the objection is waived. *Bogart v. Bra- zee*, 331 Ill., 181. *Kuhn v. Eppstein*, 239 Ill., 555. *Whalen v. Stephens*, 193 Ill., 121. *Moyer v. Swygart*, 125 Ill., 262.

We think that the tendency of plaintiff's proof, alone and undis- puted, was to fairly establish that the condition of the stairway was dangerous; that defendant knew same, or, that the condition had existed sufficiently long so that by the exercise of reasonable care it should have known it; that plaintiff did not know of such condition, and could not, in the exercise of ordinary care, have known of it; that she was not otherwise guilty of negligence which proximately contributed to the acci- dent, and that her injuries were the proximate result of such want of care on the part of defendant. Where such is true, the trial court has no discretion, but must submit the cause to the jury to determine the questions of fact. *Molloy v. Chicago Rapid Trans. Co.*, 335 Ill., 164. *Libby, McNeill & Libby v. Cook*, 222 Ill., 206. The motion to direct a verdict was properly denied, at the close of plaintiff's case.

The motion was renewed at the close of all the evidence, and again denied; which ruling is also assigned as error.

The testimony of defendant sharply contradicted that of plain- tiff, upon material and essential matters, as we shall later demonstrate. However, even so, the rule is as stated in *Libby, McNeill & Libby v. Cook*, supra, at page 213: "Evidence fairly tending to prove the cause of action set out in the declaration may be the testimony of one witness only, and he may be directly contradicted by twenty witnesses of equal or greater credibility; still the motion must be denied." And to the same effect is *Pollard v. Broadway Cent. Hotel Corp.*, 353 Ill., 312. This motion was also rightly overruled.

The further contention is made that the verdict is contrary to the weight of the evidence. We have quoted the salient features of plaintiff's case, as it bore upon the condition of the stairway at the time of the accident. We will now refer to the proof of defendant, bearing thereon.

The undisputed proof shows that, at the time, a mat lay upon the floor at the head of the stairs. Without going into a detailed discussion of the testimony bearing upon the matter of the visibility of the stairway, we deem it sufficient to say that we are satisfied that the proof overwhelmingly establishes that the lighting condition of the staircase, at the time in question, was ample to enable anyone traveling it to see, if they exercised reasonable and ordinary care, all the steps thereof, plainly and clearly.

As to whether the steps were wet on the morning of December 19, 1933, the situation is entirely different. Mrs. Chapman, the manager, Lucille Miller, Lillian Keller and Dorothy Crawl, dining room girls, and also Austin Berry and Richard Gray, bellboys, testified that they saw the steps about the time in question, and that they were dry. The bellboys had that morning traversed the steps a number of times, and saw no water upon them. Mrs. Chapman, immediately after the accident, together with the waitresses, examined the steps in order to ascertain what had caused Mrs. Herman's fall, and they saw no water or dampness on the stairs. It was testified to by Lucille Miller and Dorothy Crawl that plaintiff, interrogated as to the cause of the fall, stated that she had caught her heel and slipped, or that she slipped and tore her heel off. Plaintiff denies such statements, though she herself testified that when she fell she knocked her heel off.

This testimony was all direct and positive. The testimony of the witnesses for plaintiff on the proposition was more or less at variance with each other. For instance, the testimony of Wiley was that

there was water on every step; "puddles standing all over the stairway, it was easy to see, and if you looked right down you couldn't help but see it." Not only is it improbable that enough persons would have descended the stairway, prior to 9 o'clock A. M., to have tracked sufficient water from a rain, to have caused puddles to form on every step, but such testimony is at variance with that of Sturn, who said that he went up and down the stairs about 8:30 o'clock A. M., and did not see any water on the steps. True, he says that he was not especially looking for water, and was bent upon other things; however, if the water was on the steps at the time, in the quantities described by Wiley, it would have been noticeable to any one who had occasion to use the stairs, whether he looked for it or not. Furthermore, it contradicts the testimony of the plaintiff, who stated that she saw water at the top of the stairs, but none on the steps until after her injury. She testified: "It was a dark, dreary steps, and the steps seemed dark in there;" and further said: "If there would have been water I could not have seen it."

Wiley testified that anyone, looking down, could not help but see the water, while the plaintiff, herself, said that such a thing was impossible; saying, to use her own words: "Why, I know on terrazzo floors you can't see water." Notwithstanding this, her brother and Wiley both stated that they readily saw it on the terrazzo steps; Wiley, at all times, and her brother, after the accident.

Six witnesses for the defendant testify positively and clearly that there was no water on the steps. The plaintiff and her two witnesses give accounts of the matter which contradict each other in material particulars; while those of the defendant are harmonious, that the stairs were dry.

We are of the opinion that a verdict based upon the premise that the stairs were wet at the time in question, or that the passage was not properly or sufficiently lighted, is against the manifest weight of the

evidence. Where such is true, it is the duty of the trial court, upon motion, to set aside the verdict and award a new trial. Failure to do this is error, for which a judgment must be reversed. *Donelson v. East St. Louis Ry. Co.*, 235 Ill., 625. *Balden v. Innis*, 84 Ill., 78. In our opinion the court should have sustained the motion for a new trial.

Defendant asks that we reverse the judgment, with a finding of fact. This, upon the record, we cannot do. As we have previously indicated, the evidence for the plaintiff tended to support the cause of action, and where such is the fact, the Appellate Court is not authorized to reverse the judgment, with a finding of fact; but if it finds the verdict to be manifestly against the weight of the entire evidence in the case, must reverse the judgment and remand the cause to the trial court; as held by the Supreme Court in the recent case of *Pollard v. Broadway Cent. Hotel Corp.*, supra, at page 322. And to the same effect are, *Mirich v. Forschner Contracting Co.*, 312 Ill., 343. *Collins v. Kurth*, 322 Ill., 250. *Kinsey v. Zimmerman*, 329 Ill., 75.

Certain errors in the admission and exclusion of evidence, and in the failure of the court to incorporate in its charge a suggestion offered by defendant, are urged. However, upon the record as made, we do not think any prejudicial error was committed by the court in any of these particulars.

For the failure to sustain the motion for a new trial, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

Not to be published in full.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

OCTOBER TERM, A. D. 1934.

Term No. 27

Agenda No. 27

H. J. H. BECKER,
Complainant and Appellant,

vs.

CITY OF WEST FRANK-
FORT, ILLINOIS,
Defendant and Appellee.

APPEAL FROM THE
CIRCUIT COURT OF
FRANKLIN COUNTY,
ILLINOIS.

Murphy, J:

278 I.A. 6374

In 1918 the City of West Frankfort, appellee herein, initiated and carried through to completion local improvement project No. 4 and by the ordinance authorizing the improvement provided that the contractor should be paid in part in bonds. The maturity of the bonds was divided into installments, the last or the tenth installment falling due in September 1928. The bonds and interest accruing thereon to date of maturity were to be paid for in part by special assessment against the property abutting on the local improvement and the balance by the city as public benefits.

Appellant herein became the owner of twenty-six of said bonds of the face value of \$500 each and were of the seventh, eighth, ninth and tenth installments, falling due in the years 1925, 1926, 1927, 1928, respectively. All bonds of the installments prior to the seventh were paid in full and all the bonds of the seventh, eighth, ninth and tenth installments other than those owned by appellant were paid, with the exception of one \$500 bond. The interest accruing on appellant's bonds prior to the date of maturity was paid. The bonds did not contain any provision for interest if not paid at maturity.

Appellant filed his bill in the circuit court of Franklin County against the City of West Frankfort, appellee



herein, praying for an accounting of the funds collected by appellee on said improvement project. Upon hearing, the chancellor found that appellee had collected on the seventh, eighth, ninth and tenth installments a total of \$9,897.03, which amount had been diverted by appellee for other purposes. The court further found that the amount which appellee was to pay as public benefits was \$6,310.80. The evidence shows that levys had been made by appellee during the years of the maturities of the various installments in sufficient amounts to pay all of said public benefits and that appellee had used the amount so collected for other purposes. The court found that appellee had violated its duties as trustee and it was ordered that appellee pay appellant the amount of the face of the bonds, \$13,000., without interest.

Appellant filed his notice of appeal to this court and pursuant to sub-paragraph 3, Rule 30 of the Supreme Court Rules, 355 Ill. 32, limited his appeal to that part of the decree wherein the court failed and refused to include in said judgment interest on said bonds from date of maturity to date of trial which interest amounted to \$4,291.60. In his notice of appeal, he prays that this court reverse that part of the decree which provided for the payment of \$13,000 and to enter judgment here for \$13,000 plus the interest or a total of \$17,291.60, or, that the decree be reversed and remanded to the lower court with instructions to allow interest.

Appellee filed its notice of appearance in this court pursuant to Rule 35 and has not by said appearance appealed from any part of said decree.

The only question presented on this record is whether the court erred in not allowing appellant interest on his bonds from date of maturity to date of trial.

The evidence shows and the court so found that the city had collected from the property owners \$9,897.03 which

The first part of the paper is devoted to a general discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The second part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The third part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The fourth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The fifth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The sixth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The seventh part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The eighth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The ninth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science. The tenth part of the paper is devoted to a detailed discussion of the problem of the origin of life. It is shown that the problem is one of the most important and most difficult in the history of science.

should apply on the payment of the bonds but which had been diverted to other purposes. It also appears that the city by its general appropriation ordinances had levied and collected for the purpose of paying public benefits a sufficient amount to have paid in full all its liability in local improvement projects, including the one in question and that it had also diverted the money belonging to this fund.

The general rule is that a municipality is not liable for interest but there is a well recognized exception to that rule which is that where money is wrongfully obtained or where it is lawfully obtained and unlawfully and wrongfully withheld, the municipality is liable for interest to the same extent as a private person. *Vider v. City of Chicago*, 164 Ill. 354; *City of Danville v. Danville Water Co.*, 180 Ill. 235; *City of Chicago v. Northwestern Mutual Life Ins. Co.*, 218 Ill. 40; *Conway v. City of Chicago*, 237 Ill. 128.

In *Rothschild v. Village of Calumet Park*, 350 Ill. 330, on page 341, in passing upon the same question as involved in this case, the court said, "The plaintiff in error objects to the decree because of the award of interest to the defendant in error from the maturity of the bonds and coupons to the date of the decree. The bonds and the coupons do not provide for the payment of interest after maturity, and it is argued that there is no provision in the Local Improvement act for the payment of interest on any bond after the maturity of the bond, or the assessment levied to pay the bond, or on any past due coupon. The liability of the village for interest in this case is not based upon its undertaking to pay interest. The suit is brought to enforce its liability, as trustee, to pay to the holders of the bonds the money which it received for that purpose, and it is the same, in effect, as an action of assumpsit for money



had and received. Interest is allowed in such actions, under section 2 of the Interest act, on money had and received to the use of another and retained without the owner's knowledge. The plaintiff in error was properly charged with interest on the amount received which should have been paid to the defendant in error."

Appellee's contention in support of the decree is that appellant is chargeable with laches. The question was not raised in the circuit court either by plea or answer and cannot be raised for the first time on appeal. *Swanson v. Kohout*, 304 Ill. 606; *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Walker v. Denison*, 86 Ill. 142.

Furthermore, we are at a loss to see in what way laches could be pleaded in this case against the payment of interest on the \$13,000 when the decree of the court in allowing the principal sum has not been appealed from.

Questions have been raised concerning the right of a city to cancel the special assessments against certain property and the liability of the city to the bondholder for such action but inasmuch as the record discloses that the city had collected more than a sufficient amount to pay all the bonds outstanding on said local improvement project including appellant's, and is unlawfully withholding it, it will not be necessary to consider such questions.

For the reasons assigned the decree of the lower court as to the amount of said judgment entered against appellee is reversed and the clerk of this court is directed to enter a judgment against appellee for \$17,291.60 and costs.

Reversed with Judgment.

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

OCTOBER TERM A. D. 1934

TERM NO. 4

AGENDA NO. 2

278 I.A. 638'

EDDIE RAGAN, ADMINISTRATOR
OF THE ESTATE OF ANNIE FOX,
deceased.
Plaintiff and Appellee.

vs.

THE CLEVELAND, CINCINNATI,
CHICAGO & ST. LOUIS RAILWAY
COMPANY, A CORPORATION,
Defendant and Appellant.

APPEAL FROM THE

CIRCUIT COURT

OF

SALINE COUNTY.

STONE, J:

This suit was brought by Eddie Ragan, administrator of the estate of Annie Fox, deceased, who was killed by Appellant's train No. 9 on the evening of March 8th, 1930, at a crossing known as O'Gara One Mine crossing north-east of Harrisburg. Issue was joined on a declaration of three counts and a plea of the general issue. The jury found the issues for Appellee and assessed his damages at \$3,000. After overruling motions for a new trial and in arrest of judgment the trial court entered judgement on the verdict. Appellee being the cause here on Appeal.

The first count of the declaration alleges general negligence in Appellant's failure to ring its bell as prescribed

by the statute. The third count alleges that Appellant created a dangerous condition at said crossing and was negligent in its approach thereto in not blowing its whistle as proscribed by the statute.

The briefs give very little assistance to the Court in forming a mental picture of the situation at this crossing. As best we can make out from them, a switch engine, on the day in question, had pushed a number of coal cars to the north-east of the crossing so that persons might cross through the gap thereby left. On that day, Appellee's intestate got off of a car some distance to the north of this crossing, followed the road south to the railroad tracks, went between the coal cars and the engine and in crossing the last track was struck by the train and killed.

There is conflict in the evidence as to the distance from the crossing of the coal cars. There is also conflict as to whether Appellant's servants rang the bell and blew the whistle as the law required them to do. The Court would have been warranted in submitting this issue to the jury and the jury might well have found that Appellant drove its train at a rapid rate of speed up to and over a dangerous crossing made extra hazardous by its own conduct. However, negligence of Appellant standing alone does not warrant recovery. The element of reasonable care on the part of Appellee's intestate is an essential part of Appellee's right to recover. Appellee approached this crossing when it was almost dark. She was traveling along buildings, between an engine on her right and a string of cars upon her left. The setting of the situation called upon her for the exercise of caution. The cars upon her left were a substantial distance to the north-east of her, making due allowance for the difference in the testimony. These tracks at that point ran parallel. She could have seen some distance up the track in the direction of the train had she looked. But even had that distance been slight, there was still a distance after she passed the coal cars of some feet between the tracks where her view would have been wholly unobstructed had she looked. She did not stop; she did not look; she did not listen



so far as this record discloses. Had she done either she would have had warning. One cannot say that he did not see that which if he had looked he must have seen. In addition she was warned to stay back by a number of men standing near by. She did not heed this but stepped in front of the train coming directly toward her with its headlight burning. In *Greenwald v. B. & O. R. R. Co.* 332 Ill. 627, the court said, "The rule has long been settled in this State that it is the duty of persons about to cross a railroad track to look about them and see if there is danger, and not to go recklessly upon the track but to take proper precaution to avoid accident. It is generally recognized that railroad crossings are dangerous places, and one crossing the same must approach the track with the amount of care commensurate with the known danger, and when a traveler on a public highway fails to use ordinary precaution while driving over a railroad crossing, the general knowledge and experience of mankind condemns such conduct as negligence." To the same effect is *Provenzano v. I. C. R. R.* 357 Ill. 192. This principle applies with greater force to a pedestrian. He can stop in an instant. He can go nearer without danger and thus have better opportunity to observe danger. There is little or no excuse for a pedestrian being hit by a train. The evidence of Appellee in this case not only does not show that his intestate was in the exercise of ordinary care for her own safety but the whole evidence shows affirmatively that she was guilty of contributory negligence such as to bar recovery.

Much argument is made by Appellant and much useless repetition of statements on questions not necessary for our consideration in deciding this case. There can be no recovery and the trial court erred in not instructing the jury to find the issues for the defendant. The judgement of the trial court is reversed.

JUDGEMENT REVERSED

not to be published in full



STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

OCTOBER TERM A. D. 1934

TERM NO. 15

AGENDA 14.

JOHN H. WEDIG, Administrator
of the Estate of ADELLEE
WEDIG, deceased,

Appellee.

vs.

THE KROGER GROCERY and
BAKING COMPANY,

Appellant.

Appeal from the
Circuit Court of
Madison County.

278 I.A. 638

STONE, J:

Appellee recovered judgment against Appellant in the sum of \$10,000 for the wrongful death of his wife, Adellee Wedig, who was killed in a collision between Appellee's car and Appellant's truck and trailer, on the morning of February 11th, 1933, on route No. 3 of the state's system of durable hard surfaced roads in the village of Hartford.

The amended declaration contained five counts, two of which, the second and fifth, were withdrawn during the trial. The first count charges common-law negligence in stopping and permitting a truck to stand on a highway without having any light or other warning thereon. The third count is predicated upon the alleged violation of a statute prohibiting the driver of a vehicle to stop the same on a hard-surfaced highway so that there is not ample room for two vehicles to pass upon the road. The fourth count is likewise predicated upon a statute providing that every motor vehicle upon any highway at night shall exhibit a lighted lamp showing a red light visible in the reverse direction. A special count was to like effect. A general denial was filed to the declaration.

Appellee was seriously injured in the same collision, and has since died. His death has been suggested on the record in this court and Harriet Scott, administratrix de bonis mo of the



estate of Adelle Wedig, deceased, has been substituted as Appellee.

On the morning in question, Dr. Wedig with his wife, Adelle, was driving from Granite City to their home in Woodriver. At a point in the road near by the Hackethal farm there is an S curve. As the car in which the Wedigs were riding neared or came into the beginning of this curve at the south, another car came toward them with bright lights shining. Dr. Wedig changed the lights he was using from bright to dim as prescribed by the statute but the other driver did not. The cars passed each other safely and Dr. Wedig again turned on his bright lights. As he did so the bulk of Appellee's trailer loomed up immediately before him. From its dimensions it was much like a box car used on railroads. Some effort was made by the Dr. to avoid collision. He put on brakes and swerved to the left. He was unable to avoid hitting the trailer however, and his car was demolished and his wife killed. The truck and trailer were standing on the slab. The evidence tends to show that the fender of the trailer on the left hand side was over the black line which marks the center of the road. The truck and trailer had been there about seven minutes.

Appellee contends that at the time of the collision there were no lights burning on the rear of said trailer and no signals of any kind given for the protection of persons who might be approaching from the rear. Certain sections of the statute are pertinent to this case. Deleted of immaterial matter they are as follows:

(a) On approaching another vehicle proceeding in the opposite direction, and when within not less than 250 feet of the same, any person in charge of a motor vehicle equipped with electric headlights shall dim, drop or extinguish such headlights.

Cahill's Ill. Revised Stat. 1933, Chap. 95 (a),
Sec. 16 (e)

(b) When upon any public highway in this state, during the period from one hour after sunset to sunrise*** each motor vehicle, trailer or semi-trailer, shall also exhibit at least one lighted lamp which shall be so situated as to throw a red light visible in the reverse direction.

Cahill's Ill. Revised Stat. 1933, Chap. 95 (a),
Sec. 16 (a)



(c) No driver of a vehicle shall stop the same on any durable hard surface state highway or allow it to stand in such position that there is not ample room for two vehicles to pass upon the road.

Cahill's Ill. Revised Stat. 1933, Chap. 121, Par. 161 (2), Sec. 145 (f)

Appellant contends that its truck had become stalled there, that the driver was unable to remove it. That therefore an emergency existed, but that lights were burning on the rear of its trailer and that there was also a large reflector on the rear of said trailer.

It also contends that the Wedigs were guilty of contributory negligence in connection with the collision because they dimmed their lights when passing the southbound car. Dr. Wedig did what the law required of him when he dimmed on meeting the other car. Surely, it is not negligence for one to do that which the law commands him to do. Neither would reasonable minds agree that the act of dimming lights on the meeting of cars is a negligent act. Reasonable minds have spoken affirmatively on that subject and their opinion and their will have been expressed in an act of the legislature. So far from being a negligent act, it is a wise precaution of road policy in this state and indeed a most efficacious one. The Wedigs were not guilty of contributory negligence in following this established policy which has its expression in the letter of the statute.

Appellant contends that the blinding light coming toward the Wedig car was the proximate cause of the collision. We can not find warrant for this contention in the evidence. Dr. Wedig says he just couldn't see. That was exactly the condition in the Herberger case 268 Ill. App. 403 and in the Spiers case 271 Ill. App. 178. Likewise is it the experience of every driver. There are times on the hard roads when one cannot see what is ahead. Doubtless the legislature in adopting the rules of the road took into consideration all of the hazards of traffic, among them the bright light driver; and no doubt the strict rule against stopping cars upon the slab in the night time was one of



the results of their consideration. The bright light may have contributed to the injuries and death in question but the fact remains that had not Appellant's and "Big Box car Trailer" been standing in the highway, there would have been no collision. Every man who drives with bright lights does not cause a collision. The injuries in this case occurred proximately because Appellant's equipage was standing on the highway. If Appellant's servant was guilty of no negligence and was where he was as a matter of right, there can be no recovery, but that does not change the actual fact about what caused the wreck.

We are now to consider whether Appellant's servant was negligent in the premises. In considering his testimony it must be borne in mind that he was in charge of Appellant's property and answerable to Appellant for anything that happened to it. Likewise a woman lost her life on account of the alleged negligence of this servant. Quite likely his job depended upon the outcome of this case or at least he believed it did. It cannot be said that he was a disinterested witness. He was evidently unfamiliar with this car. He had never driven it over this road before. If he had been attending to business, he would have felt the sensation of his engine stopping even if he did not consider it important to make an examination when the engine began to spit some distance back. This was a heavy load. After his engine died, the momentum of the load would carry the car far enough to run it off the slab. If the shoulder was only four feet wide he could have driven two wheels off and thus have allowed room for two cars to have passed. He allowed his truck and trailer to stand on the slab about seven minutes during which he made no effort for the safety of others on the road. He was standing on the right side of his truck with a torch-light in his hand, when he saw the Doctor's car 60 feet away. He says himself that had he run back there he might have gotten there in time. As to the lights on this trailer, the driver of the truck says he turned off his lights to save his battery but that he turned on his cowl lights and that that also turned on the rear lights on the trailer. One witness saw lights as he approached. One witness did not see any such lights. It was kind of gray. Everything



looked alike. If the lights on this trailer were burning it seems quite evident that Dr. Wedig would have seen them long before he met the south bound car. At any rate it was obviously a question of fact for the jury whether the lights were on. If they were not on under the circumstances it was clearly a neglect of duty on the part of Appellant's servant as well as a violation of the law. The jury has found that Appellant was guilty of negligence which caused the death of Appellee's intestate. We cannot say that that finding was against the manifest weight of the evidence.

Complaint is made that the trial court did not secure to Appellant that fair and impartial trial which the law demands. We have examined the record as to the things specifically complained of. Things on paper do not always appear the same as they do when they are said and done. They are easily susceptible of being magnified. We have the greatest respect for the distinguished judge who sat upon this case. Had the things complained of been called to his attention he would have passed upon them in a manner entirely disinterested and unbiased. Dr. Wedig, when he was on the witness was in a serious condition. He has since died. He was reciting details of an incident most terrible to him. It was perfectly proper that the court should show a sympathetic attitude to him providing the court did not go beyond the bounds of propriety and we do not believe that it did.

The statement of the witness that he had talked to the Insurance man is not in the class of statements which the courts have condemned. So far as this record discloses the person referred to was not in any way connected with or had any interest in this case. He may have been some person engaged in the insurance business in some entirely different line and in the court room as a spectator. He did not sit at the counsel table and there was no circumstance to connect him with the case. The trial judge was likewise in the best position to judge the effect if any of this incident. Counsel's reference to the driver of the truck as a scoundrel was not of the character to be prejudicial.



Appellant has waived the assignment that the court erred in its charge to the jury be not arguing it. We assume therefore, that this case went to the jury under proper instructions as to the law applicable.

We find no reversible error in this record. The judgment will therefore be affirmed.

JUDGMENT AFFIRMED.

not to be published in full.

1882

1883

1884

1885

53



AGENDA 23

278 T A 638³

vs.

OSCAR T. LIESE, WALTER E. LIESE,
HENRY LIESE, OSCAR M. LIPPERT,
doing business as LIESE
LUMBER COMPANY,

St. Clair County.

STONE, J:

On the afternoon of December 5th, 1932 Appellee's truck and Appellants' coupe, loaded with lumber were brought into collision near a curve in Mitchell Lane west of and near the city limits of the city of Belleville. Appellee was injured, as were his two children and his truck. He brought suit in the Circuit Court of St. Clair County. A trial was had on an amended declaration and a plea of the general issue. In his amended declaration Appellee charged that he was driving an automobile owned and operated by himself in an easterly direction on said highway; that he was then and there in the exercise of ordinary care for his own safety and for the safety of his passengers and his property. That Appellants so negligently and carelessly drove and operated their said automobile as to cause it to skid and collide with Appellee's truck; that by reason of said collision Appellee was violently thrown against various parts of his said truck and against the occupants thereof and thereby received divers cuts, bruises and wounds upon his shoulders and back;



that various bones, ligaments and other tissues in his shoulders and back were broken and contused whereby he was laid up and required medical aid for a long period of time, that he suffered great pain and that he was unable to perform his usual duties and was compelled to expend large sums of money in and about being healed and cured of his injuries. The declaration also charges loss of his property and doctor bills for the treatment of his children.

The jury found the issues for Appellee and assessed his damages at \$3500. A motion for a new trial was overruled and judgment was rendered on the verdict. The only errors assigned are that the verdict is against the law and the evidence; the court erred in the admission of testimony and that the damages are excessive. Appellee cannot be charged with contributory negligence for his truck was stopped on his own side of the road when the coupe hit it. It cannot be said that the court should have given the peremptory instruction on any other theory as the court was fully warranted in permitting the jury to decide whether the Appellants were guilty of negligence which caused Appellee's injuries. Appellants' servant was driving a loaded car on a slick road at a rate of speed at which he could stop when he tried to in time to prevent the collision. He could have stopped farther back without question. This he did not do but waited until he got to a point at which he must have known his car might skid when he put on his brakes. The jury found for Appellee on this issue and we cannot say that it was not justified by the evidence in so finding.

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1-11-25*

Complaint is made that the verdict is excessive. A glance at Appellee's injuries and the effect thereof refutes this contention. Appellee was seriously and permanently injured and had large expense in connection therewith.

No question of law is presented for review here. Only questions of fact which the jury has decided adversely to Appellants' contention are presented. The jury was the final arbiter of those questions.

The judgment of the Circuit Court is affirmed.

not to be reported in full JUDGMENT AFFIRMED.



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